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SUPREME COURT, U.S.

No. 83-5815

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1983

STEVEN ROY HARPER,

Petitioner,

vs.

STATE OF NEBRASKA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

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QUESTIONS PRESENTED

1. Is a capital defendant denied effective assistance of counsel at the penalty phase of his capital trial when his court-appointed counsel fails to present crucial mitigating evidence concerning the defendant's voluntary cooperation with the police, thus leading the sentencing judge to erroneously conclude that the defendant failed to cooperate, and to consider that supposed lack of cooperation as a major factor in imposing a sentence of death?

2. Once a defendant demonstrates that he has been denied effective assistance of counsel at the penalty phase of a capital trial, which party bears the burden of proof on the issue of prejudice?

3. Does the Sixth Amendment establish a minimum uniform national standard for evaluating the performance of a criminal defense attorney, or may a State measure attorney competence against a variable standard which depends upon the average level of competence in the particular geographical community where the trial occurred?

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PETITION FOR A WRIT OF CERTIORARI
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Petitioner Steven Roy Harper respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Nebraska affirming the denial of his application for postconviction relief.

OPINIONS BELOW

On direct appeal the Supreme Court of Nebraska affirmed Petitioner's convictions and sentences of death and imprisonment in an opinion filed on April 17, 1981. State v. Harper, 208 Neb. 568, 304 N.W.2d 663 (1981). This opinion appears as Appendix A to this Petition.

Petitioner's state court Petition for postconviction relief was denied by the District Court for Douglas County, Nebraska on October 25, 1982. The unreported order of the Douglas County District Court appears as Appendix B to this Petition.

The Nebraska Supreme Court affirmed the denial of postconviction relief in an opinion filed on July 22, 1983. State v. Harper, 214 Neb. 911, 336 N.W.2d 597 (1983). This opinion appears as Appendix C to this Petition.

JURISDICTION

The opinion of the Nebraska Supreme Court affirming the denial of postconviction relief was entered on July 22, 1983. The Nebraska Supreme Court denied a timely motion for rehearing in an order dated September 28, 1983. The order denying rehearing is attached as Appendix D to this Petition. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3)

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment VI to the Constitution of the United States provides in part: "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

A. Procedural History

Petitioner Steven Roy Harper was charged and convicted of two counts of first degree murder and three counts of poisoning with intent to kill, wound or maim. The facts of the crime are set out in detail in State v. Harper, 208 Neb. 568, 304 N.W.2d 663 (1981). The jury prosecution contended the defendant, entered the home of Ms. Sandra Johnson in Omaha, Nebraska on the evening of September 9, 1978, and placed a carcinogenic substance in containers of milk and lemonade which he found in the icebox. Following consumption of milk and lemonade, Sandra Johnson's husband and her nephew died. Ms. Johnson's daughter, her sister, and her brother-in-law also consumed the toxin. They became seriously ill, but they survived.

Harper was arrested on October 13, 1978 in Beaumont, Texas. That evening he was questioned for approximately two hours by Officer Greg Thompson of the Omaha Police Department in the Jefferson County Jail. After Thompson assured Harper that their conversation would be "off the record," Harper confessed and agreed to identify the toxic substance he used. Harper told

Thompson that he put a drug referred to as "DMBA" in the milk and lemonade.

Harper was then returned to Nebraska to stand trial. On January 8, 1979, Harper appeared in court for his preliminary hearing. Prior to the hearing, while waiting in a holding cell, Omaha Police Officer Kenneth G. Miller spoke to Harper and again asked him to identify the toxic substance used. Miller asked Harper if he used DMN. Harper replied he was not sure of the name. Miller then showed Harper the chemical name of the substance -- dimethylnitrosamine -- and Harper said he was pretty sure that was it. At the time Harper's attorney was completely unaware that this conversation was taking place.

On July 2, 1979, Harper's new attorney, Lawrence J. Corrigan, the defendant, and the prosecutor, appeared before the trial judge at a closed in-chambers hearing. At this "disclosure hearing" defense counsel informed the trial judge that Harper had previously tried to assist the State by identifying the drug used, and that Harper was now supplying the State with additional details as to the exact amount of the drug used. The State promised that the disclosed information would not be used against him in any way. The record of this in-chambers hearing was then sealed.

On July 10, 1979, a suppression hearing was held before the same judge, concerning the admissibility of the statements made by the defendant to Omaha Police Officers Thompson and Miller. Defense counsel was not informed of the fact that Miller had talked to Harper until the morning of the suppression hearing. The trial judge granted the motion to suppress in part, by ruling that both statements were inadmissible in the State's case-in-chief. But the court denied the motion in part, by ruling that the statements were voluntary and would be admissible

for rebuttal purposes in the event that the defendant chose to testify.

The case was tried to a jury over a three week period from September 17, 1979 to October 4, 1979. The jury returned guilty verdicts on all counts.

Under the Nebraska death penalty scheme, the trial judge makes the decision whether to impose a sentence of death. A hearing on aggravating and mitigating factors was held on October 26 and November 5, 1979. At that hearing, defense counsel Corrigan failed to present the testimony of Omaha Police Officers Greg Thompson and Kenneth Miller, on the issue of Harper's cooperation and assistance in attempting to identify the drug.

On November 7, 1978, the trial judge entered a sentence of death. In his written findings, the trial judge found four statutory aggravating factors and no mitigating factors. The court refused to find that Harper's disclosures concerning the identity of the poison constituted a mitigating factor.

On appeal the Nebraska Supreme Court affirmed Harper's conviction and the sentence of death. State v. Harper, 208 Neb. 568, 304 N.W.2d 663 (1981).

Harper initiated a postconviction proceeding in the Douglas County District Court, alleging, inter alia, that his attorney, Lawrence Corrigan, had failed to provide effective assistance of counsel at the penalty phase of his trial. A hearing was held before the same judge who had presided over the trial. The court entered an order denying postconviction relief on October 25, 1982. Harper again appealed to the Nebraska Supreme Court, and that Court affirmed, holding that Harper's allegation of ineffective representation was without merit. State v. Harper, 214 Neb. 911, 336 N.W.2d 597 (1983).

B. Facts Relevant To Argument

1. October 13, 1978
Statement given to Officer Thompson.

Following Harper's arrest on the morning of October 13, 1978 in Beaumont, Texas, Omaha Police Officers Kenneth G. Miller and Gregory Thompson, accompanied by Douglas County Prosecutor Samuel W. Cooper, flew to Texas to interrogate Harper. (Tr.Trans. 134). Acting on the advice of police psychiatrist Dr. Emmet Kenney, it was decided that Thompson should interview Harper with no one else present. (Tr.Trans. 110, 134-35). Thompson was instructed to appear honest and direct, and to let Harper sit next to the door to the interrogation room. (Tr.Trans. 135).

While waiting for Harper to be brought to the interrogation room, Thompson was informed by a jailer that Harper had tried to commit suicide. (Tr.Trans. 135). Thompson was told that Harper had wounds on his left wrist and elbow, which did not appear to be serious. (Tr.Trans. 135-36). According to Thompson, the jailers stated that Harper did not appear to require hospitalization, but that the decision would be up to Harper. (Tr.Trans. 136). When Harper was brought into the interrogation room, Thompson observed bandages on his wrist and elbow, and spattered blood on his pants and shoes. Thompson said Harper told him that he did not want to go to the hospital and that he was not dizzy. (Tr.Trans. 138).

At the suppression hearing, Thompson testified that he advised Harper of his Miranda rights using a standard police Rights Advisory Form. (Tr.Trans. 139-40). Thompson claimed that the form "was lost some place between Omaha and Texas" and that the police no longer had it. (Tr.Trans. 154). Harper acknowledged each of his rights and replied affirmatively when asked if he was willing to make a statement. (Tr.Trans. 139-40).

Thompson said when he advised Harper of his rights he was unaware that Harper was represented by counsel. (Tr.Trans. 140). Thompson then asked Harper to tell him his side of the story about the poisoning of Sandra Johnson's family. Harper replied that he wanted to talk but "his attorney told him not to make any statements." (Tr.Trans. 141).

Thompson left the interrogation room and conferred with the prosecutor, Mr. Cooper, and his fellow police officer, Kenneth Miller. Thompson was told to get the name of the drug which Harper had used, because the doctors needed to know it in order to treat the surviving members of the Johnson family. (Tr.Trans. 141). Thompson believed that it was Miller who told him he had to get the name of the drug. (Tr.Trans. 156). Thompson went back into the interrogation room. Harper again told Thompson that he did not want to make a statement "because his lawyer told him not to." (Tr.Trans. 141). Thompson then said that he would like to talk to Harper "off the record." Harper agreed to talk off the record and then gave Thompson a complete confession. (Tr.Trans. 141).

Harper told Thompson that while working at the Eppley Cancer Institute in Omaha, Nebraska, he had taken a drug which he called "DMBA". Harper said that he took the drug, entered the Johnson residence with it, and poured it into containers of lemonade and milk that he found in the icebox. (Tr.Trans. 142). At the conclusion of their conversation, Officer Thompson had Harper transported to the Baptist Hospital of Southwest Texas (Tr.Trans. 144), where Harper was treated and a 1 1/2 inch wound on his wrist was closed with stitches. (Tr.Trans. 149, Exhibit No. 6). The entire conversation between Thompson and Harper at the Jefferson County Jail lasted about two hours. (Tr.Trans. 139).

2. January 8, 1979
Statement given to Officer Miller

On January 8, 1979, Harper was taken to his preliminary hearing and was placed in a holding cell next to the courtroom. (Tr.Trans. 99-100). Omaha Police Officer Kenneth Miller talked with Harper, without advising him of his Miranda rights, and without the knowledge or permission of Harper's attorney. (Tr.Trans. 100, 131).

Miller asked Harper if he would tell him what kind of poison he used. Miller explained that the information might help the doctors who were treating the survivors. (Tr.Trans. 100). Miller later testified at the postconviction relief hearing that by January of 1979 the doctors had decided that the substance used could not have been DMBA, and they believed it was more likely that Harper had used a drug called dimethylnitrosamine (DMN). (Post.Con.Trans. 33).

Miller asked Harper if he had used DMN. Harper said he was not sure. (Tr.Trans. 101). Miller wrote the word "dimethylnitrosamine" down on a piece of paper and showed it to Harper. (Tr.Trans. 101; Post.Con.Trans. 33). Harper said he thought that was what it was. Miller asked if he was sure, and Harper replied that if it had been "a member of his family that was exposed to it, this is what he would ask them to treat for. In other words, he wasn't definitely sure that that was the chemical name, but he -- he thought it was." (Tr.Trans. 101).

3. Disclosure Hearing

On July 2, 1979, defense counsel, Larry Corrigan, scheduled a closed hearing in chambers before the trial judge. Corrigan informed the judge that he was disclosing information to the State for "humanitarian reasons" with the understanding that the information would not be used against Harper by the prosecution. (Tr.Trans. 44). The prosecutor agreed that the

information would never be used against Harper. (Tr.Trans. 45). Corrigan made the following disclosure statement:

> [T]he amount of drug that would be, had been, or might have been used in this case is six to seven cubic centimeters of dimethylnitrosamine; that the substance came in the manufactured form; that there were no additional drugs in any way added, nor was the substance altered in any form; that the mixture was placed in approximately equal amounts in lemonade in a plastic container that was not full and also in a one-gallon milk container that also was not full. Approximate amounts: approximately half the milk --this is just an approximate -- and more in the lemonade container; more fluid was in the lemonade container.

Tr.Trans. 44.

Defense counsel then betrayed his ignorance by mistakenly asserting, in response to a question from the prosecutor, that dimethylbenzanthracene (DMBA) and dimethylnitrosamine (DMN) were "the same thing." (Tr.Trans. 44). The two drugs are, in fact, two different substances.

The court then attempted to establish exactly what information had been known to the prosecutor before the July 2nd disclosure hearing. The judge stated, "it's my understanding ... that the substance itself had already been detected by the State prior to this date" and that it had been previously discovered "through investigation that the substance had been placed in lemonade and milk . . . ." The prosecutor confirmed that this was correct. (Tr.Trans. 45). The court stated that it wanted to avoid any future dispute "as to what was discovered by the State and what was discovered through this information." (Tr.Trans. 45). However, defense counsel then stated that the State's prior identification of the drug as DMN was related to the prior disclosure made by Harper on the day of preliminary hearing six months earlier:

> Mr. Corrigan: . . . This is not the first time that Steve has disclosed the name of the drug to authorities of the Omaha Police Department. He did so at the preliminary hearing when -- and it was -- he was told it wouldn't be used against him in any way, but I -- just so we have a clear understanding. I don't know how far they went with the other information they

> received from Steve, but they were -- he did tell them, K.G. Miller. He told K.G. Miller what the drug was on an informal basis at the time of the preliminary hearing in the preliminary hearing courtroom.
>
> The amount -- which is, I think, more important right now as far as the treatment and the solution -- was not specifically asked at that time, just whether or not this was the drug. I just want that in the record, at least want that in the record. I'm sure they have used that part of it also, and I have no quarrel with the fact that they've used it; but I do want you to understand that even where they are right now might have been assisted by Mr. Harper on his own and by a voluntary basis, okay?

(Tr.Trans. 46). Neither the prosecutor nor the judge responded to these remarks of defense counsel and the hearing then ended with an order that the transcript be sealed. (Tr.Trans. 46-47). Thus it was left unclear what the prosecutor meant when he said that the drug had been identified prior to July 2, 1979. This topic resurfaced three years later at the hearing on Harper's petition for postconviction relief.

4. Scientific attempts to identify the drug used.

During a search of Harper's residence, conducted on October 3, 1978, police found one small brown bottle and one vial which appeared to contain chemicals. (Tr.Trans. 79-81, Trial Exhibit No. 4). Dr. Henry Fales, Chief of Laboratory Chemistry at the National Heart, Lung and Blood Institute, conducted mass spectrometric tests to identify the contents of the bottles. (Tr.Trans. 1004, 1008). The brown bottle contained dimethylbenzanthrace (DMBA). (Tr.Trans. 1017, 1021). The vial contained paradimethylaminobenzaldehyde (DMABA). (Tr.Trans. 1014, 1021).

Of these two substances, only DMBA is a carcinogen. (Tr.Trans. 978). DMABA is a chemical reagent used for detection and analysis of other chemicals, and is not a carcinogen. (Tr.Trans. 978). No containers of dimethylnitrosamine (DMN) were found in the search of Harper's home. DMN is a carcinogen.

(Tr.Trans. 978). Both DMN and DMBA are commercially available. (Tr.Trans. 983).

On October 14, 1979, the day after Harper's arrest in Texas, the Director of the Eppley Institute for Cancer Research at the University of Nebraska, met with an Omaha police officer and a representative from the prosecutor's office. (Tr.Trans. 1221, 1224). Harper was a former employee of the Institute. The Director suggested that the police should consider DMN as a candidate for the substance used by Harper. (Tr.Trans. 1224).

Dr. Rennate Kimbrough of the Center for Disease Control in Atlanta, Georgia, testified that DMN metabolizes once ingested. After four or five days inside a human body, DMN can no longer be found because it has been converted into other chemicals. (Tr.Trans. 1152-53).

Dr. Kimbrough sent tissue samples from the deceased victims to Professor Shank at the University of California at Irvine for testing purposes. Because DMN is a methylating agent which alters the chemical structure of DNA, Dr. Shank isolated and then examined the DNA contained in the tissue samples. He found the DNA had been exposed to a methylating agent. (Tr.Trans. 1086). His findings were consistent with the hypothesis that DMN was the drug used by Harper. However, Dr. Shank noted that approximately twenty other chemical agents could also methylate DNA in the same manner. (Tr.Trans. 1086-87).

Dr. Kimbrough examined samples of liver tissue from the victims and found evidence of severe damage to the liver cells that was also consistent with exposure to DMN. (Tr.Trans. 1128, 1132). Dr. Kimbrough ultimately concluded that in her opinion DMN was the chemical used by Harper. (Tr.Trans. 1165).

5. Sentencing order of trial judge.

On November 7, 1979, the trial judge sentenced Harper to death by electrocution. In his written findings the judge rejected defense counsel's argument that Harper's efforts to help identify the drug should be considered as a mitigating factor warranting leniency. The judge erroneously concluded that the State had already identified the drug as DMN before Harper told Officer Miller he thought it was DMN at his preliminary hearing. The judge seemed to express doubt as to whether Harper had really been trying to give the police the correct drug name when he told Officer Thompson on October 13, 1978 that he thought the drug was DMBA. Finally, the judge erroneously found that Harper did not confess to actually putting the drug in the lemonade and milk containers until the disclosure hearing on July 2, 1979. The court entered the following written findings:

> It was not until after his arrest by the U.S. Marshal in Beaumont, Texas, on October 13, 1978, nearly a month after two of the victims had died, that the defendant admitted his crime; and even then he incorrectly identified the toxic substance used as being DMBA. Not until his preliminary hearing on January 4, 1979, when the State had discovered by independent investigation that the toxic substance used was dimethylnitrosamine rather than DMBA, did the defendant, who was then represented by counsel, confirm to Officer K.G. Miller of the Omaha Police Division that this was, in fact, true. Moreover, it was not until a hearing in closed chambers on July 2, 1979, that the defendant, once again with counsel present, finally admitted that he had added to the lemonade and milk containers in the Johnson refrigerator the quantity of six to seven (6-7) cubic centimeters of dimethylnitrosamine, undiluted with any other substance.
>
> Therefore, the court finds that very little weight should be given to the defendant's subsequent admissions, since he failed to act at a time when such information was essential to the survival of Duane Johnson and Chad Shelton and to the complete recovery of Bruce and Sallie Shelton and Sherrie Johnson.

Order of Sentence at 19-20.

As previously noted, defense counsel failed to call either Officer Gregory Thompson or Officer Kenneth G. Miller at the penalty phase of the trial.

6. Postconviction hearing.

On September 13, 1982, in the District Court of Douglas County, Nebraska, the court heard the testimony of Omaha Police Officers Thompson and Miller, Prosecuting Attorney Samuel W. Cooper, and defense attorney Lawrence J. Corrigan, as it related to Harper's postconviction relief petition.

The testimony focused, in part, upon Corrigan's failure to call Thompson and Miller as witnesses at the penalty phase of the 1979 trial, and on the subject of how and when the prosecutor definitively determined that the drug used by Harper was in fact dimethylnitrosamine (DMN).

Corrigan testified that "quite early in the course of the case" he and Harper had agreed that if he could be of any help to the three survivors, he would provide any information requested by the treating physicians. Corrigan explained that they had a tough time deciding

> whether disclosure should be made on the record or should just be made by me [Corrigan] to Mr. Cooper, [and] then transmitted to the doctors. We spent a day trying to decide exactly how we wanted to do it, and I decided along with Steve [Harper], I think we made a joint decision, that we would be better off making the disclosure on the record. And for a number of reasons, it was a very difficult decision. I am not sure whether it was a good one or a bad one. But I did feel that Steven's life was in jeopardy, and I felt there would be a good chance that he would be convicted, and I felt if a disclosure were not made on the record he would not get any credit for making the disclosure from subsequent judges that would hear the case. And for that reason I decided to go ahead and allow it to go on the record rather than to just make it a phone call between Mr. Cooper and myself.

Postconviction Hearing, Exhibit No. 5, at 29-30.

Corrigan testified that he did not have any difficulty in persuading Harper to go along with the disclosure because "if there was anything they could do to help those [three surviving] people, Steve was anxious to do -- to -- to help them." (Postconv. Trans. 70). When asked why he failed to call Miller and Thompson as witnesses at the mitigating hearing before the

trial judge, in order "to show to the Court that Harper fully cooperated with both police officers," Corrigan replied:

> Well, that was already in the record in its entirety from the first -- from the preliminary motions. And it was quite obvious that Judge Murphy was well acquainted with the facts on those statements. I felt -- I didn't feel -- in fact, to be truthful it never entered my mind because I knew that he'd sat through the entire hearings on both -- on both confessions.

Postconv. Trans. 75-76 (emphasis added).

Corrigan also explained, as he had attempted to do three years earlier at the July 2, 1979 disclosure hearing itself, that the information disclosed at the in-chambers hearing was supplemental to information that had been previously disclosed by Harper.

> Harper and I decided to make any kind of disclosure that might help those people early in the course of my representation of him. The issue was really whether or not it would do any good, because we felt that they already knew that the substance, based on Steve's statement at the preliminary hearing, jail statement, and all that, and we knew also that all of their medical indications were that dimethylnitrosamine would be a likely candidate for the type of sickness and illness that the people suffered from. . . . The issue really got down to whether or not it would be of any medical assistance to the doctors who were treating these people to know the quantities and whether or not there were any other drugs in the mixture. And we came to the conclusion that it might be of some assistance, and Steve decided to go ahead and do it.

Postconv. Trans. 32.

Harper's own deposition testimony was also received in evidence at the postconviction hearing. His testimony reveals that to this day, Harper is not positive that he used dimethylnitrosamine, but he believes that is what he used. Harper testified that Officer Miller "wanted to know if the drug he had written out on his little pamphlet [sic] was what I thought was the toxin or the drug." (Exhibit No. 6, Postconviction hearing, Deposition of Steven Harper at 43). Miller wrote the word "dimethylnitrosamine" on his pad of paper and Harper responded that he believed that was the drug used.

> A: . . . I told him that as far as I could remember, and if it was my family that was exposed to it, that I would say that must be the agent, or that would be the agent. Because I would want the doctors to look at it.

Exhibit No. 6, Deposition of Harper at 44-45.

Harper expressed confusion as to why Corrigan advised him to make another disclosure in the judge's chambers, when Harper had already made the same disclosure of the drug's identity six months earlier. (Exhibit No. 6, Deposition of Harper at 56). Harper explained that even though he thought it was strange to go through the ritual of again disclosing what he had already disclosed, he did it because his attorney, Mr. Corrigan, advised him that he should do it.

> [E]ven though I knew that I couldn't say anything more than I already had as far as helping any of the victims, because as far as I knew the State knew everything that could possibly tell anyway, because I told them, then I -- my major decision on this was what would Judge Murphy do if I didn't come forward, so I thought if I came forward and said anything that Mr. Corrigan felt I should say, that that would go in my favor at the sentencing.

Exhibit No. 6, Deposition of Harper at 57 (emphasis added).

Officers Thompson and Miller both testified that if they had been called to testify at the mitigation hearing, they would have testified that Harper tried his best to correctly identify the drug and to cooperate with them. Thompson testified that Harper appeared to him to be cooperating when he identified the drug as DMBA.

> Q: . . . Now during the period when you were having this discussion, did Harper appear to you to be making his best effort to tell you?
>
> • • •
>
> Q: Well, did he appear to be evasive or . . .
>
> A: Well, he seemed to be just telling me what was going on.
>
> Q: I mean, what we have up to now is a perfectly normal person sitting in a chair talking to you about distributing a drug; and he told you how he did it, didn't he?
>
> A: Yeah.

Q: And he told you what route he took and everything that he did with the drug. Did he appear to you to be making his best effort to recall what he did and to tell you what the drug was?

A: It's hard to recall after three years, but I'd say yes.

Q: Did you ask him whether he knew what DMBA stood for?

A: No. I don't -- I don't believe so.

Postconv. Trans. at 25 (emphasis added).

Thompson confirmed that if Corrigan had called him as a witness at the mitigation hearing, Thompson would have attested to Harper's full cooperation.

Q: Did he cooperate with you? Didn't he try in [sic] the best of his ability to tell you what happened?

A: I -- I would say he did.

Q: Wouldn't you have said that -- under oath at a --at a later hearing prior to sentencing?

A: Yes, I probably would have.

Postconv. Trans. at 27.

Officer Miller testified that sometime after October 13, 1978, the State found out that Harper could not have used DMBA, and that the State had been informed "that probably the chemical more likely to have been used was ... dimethylnitrosamine." (Postconv. Trans. at 33). Miller's purpose in talking to Harper on January 8, 1979 "was to find out what he had used, intending to pass this along to the medical authorities." (Postconv. Trans. at 33). Miller's testimony reinforces the conclusions that (1) Harper was not sure himself what drug he used, and (2) Harper tried his best to help the police identify the drug.

I asked him if he would tell me what he used. And he said he would. I asked what it was. And he replied that he didn't -- he didn't exactly know the name of it. And I asked, "would you know it if you'd seen it?" So I had written down the word, "dimethylnitrosamine", in my notebook, so I took the notebook out, showed him the word, and pronounced it dimethylnitrosamine, and he said, "Yes, that is what I used." And I asked, "How sure are you?" And he says, "Well, I'll put it this

way: if it were my family that was affected by it, that's what I would tell them to treat for."

Postconv. Trans. at 33-34.

When he questioned Harper on January 8, 1979, it was Miller's understanding "that the medical people involved with the treatment of the families did not have any knowledge at all of what it [the drug] was." (Postconv. Trans. at 35). He did have information, however, that DMBA could not have been the drug used, because it was not a carcinogen. Miller testified that he thinks he told Harper that his prior identification of the drug as DMBA was incorrect. (Postconv. Trans. at 36). Miller asked Harper if the drug he used was dimethylnitrosamine and Harper replied that he thought it was. Miller corroborated Thompson's assessment of Harper's sincere efforts to cooperate.

Q: All right, now when you asked these questions of Mr. Harper, he appeared to cooperate with you fully in an attempt to tell you what it was, didn't he?

A: Yes.

Postconv. Trans. at 36.

Q: At a mitigation hearing, would you have testified that he did his best to cooperate with you to identify the drug that was used?

A: Yes.

Postconv. Trans. at 42-43.

The testimony of prosecuting attorney Samuel Cooper elaborated on the issue of when the State positively established that the drug used was DMN. Cooper explained that shortly after Harper's arrest, the Director of the Eppley Cancer Institute at the University of Nebraska Medical Center had suggested that "the most likely substance in the possession of Eppley to have caused [the poisonings] would have been dimethylnitrosamine." (Postconv. Trans. at 50). Then, "in late 1978)," Dr. Kimbrough of the Center for Disease Control in Atlanta, examined the prepared autopsy slides of liver sections from the victims and

made a "tentative identification" of the toxin as DMN based on the observed necrosis of liver cells. (Postconv. Trans. at 51-52). Finally, when Dr. Shank of U.C. Irvine performed the sophisticated analysis of isolated DNA from tissue samples and found highly methylated amino acid groups, the identification of DMN was considered to be "positive". (Postconv. Trans. at 51, 53). Cooper testified:

> I don't think that there was ever a positive identification of dimethylnitrosamine until perhaps six weeks prior to trial. I mean where it was shown medically that that's exactly, scientifically what it was.

Postconv. Trans. at 53 (emphasis added).

Trial commenced on September 17, 1979. Thus "six weeks prior to trial" would have been about August 1, 1979. Cooper's postconviction hearing testimony that the drug was not positively identified as DMN until August of 1979 must be compared to his briefer statement made at the disclosure hearing three years earlier, that the prosecution had already identified the toxin as DMN when Harper told Officer Miller, on January 8, 1979, that DMN was the substance he used. (See Tr.Trans. 45). Nor can Cooper's statement made at the disclosure hearing in July of 1979 be easily reconciled with Officer Miller's 1982 testimony that on January 8, 1979, "the medical people involved with the treatment of the families did not have any knowledge at all of what [the drug] was." (Postconv. Trans. at 35).

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED IN THE COURTS BELOW

Petitioner raised his Sixth Amendment ineffective assistance of counsel claim by filing a Petition for Postconviction Relief in the Douglas County District Court. His initial pleading in that action stated that the principal issue raised was whether "the defendant was rendered prejudicially ineffective assistance of counsel, in violation of the Sixth Amendment to the United States Constitution." Motion to Vacate and Set Aside at 2, Appendix E. Following an evidentiary hearing, the District Court judge denied Harper's Sixth Amendment claim and entered an order which simply stated that Harper's trial counsel had performed in a competent manner. Order, Appendix B. The District Court failed to enter any factual findings as to the nature of trial counsel's performance.

Harper appealed to the Nebraska Supreme Court, again claiming a federal constitutional violation from his counsel's ineffective performance. Brief of Appellant, Nebraska Supreme Court No. 82-725 at 1,4. Harper's ineffective assistance argument focused on his attorney's failure to present evidence of his cooperation with Omaha police officers at the mitigating hearing before the sentencing judge.

> At the evidentiary hearing, [on postconviction relief] both police officers testified that had they been called to testify at the mitigation hearing they would have testified to the effect of Harper's willingness to cooperate with them in treating the other sick survivors. Mr. Corrigan failed to produce them and left in Judge Murphy's mind a prejudicial attitude surrounding the statements given which is reflected in the quality and tone of Judge Murphy's Order.
>
> From Judge Murphy's Order, it seems as though he himself has experienced some confusion in the facts of this matter. The judge implies that the statement was made to K.G. Miller with the knowledge of then counsel David Hertzog. The evidentiary hearing established that this statement took place in a holding area adjacent to the courtroom, and no counsel was present

> or advised with any clarity that it had been made. No report was ever made. This lack of a mental picture of what took place would never have happened if Mr. Corrigan had produced the police officers at the mitigation hearing as was his obligation for the reasons stated above. It wasn't a case of "finally admitting at the disclosure hearing," it was Mr. Harper's consistent course of conduct ever since his initial arrest. The state of mind of Judge Murphy reflects a prejudice and a misreading of the facts which we claim flows from Mr. Corrigan's failure to properly put these damaging admissions into their factual context.

Brief of Appellant, Nebraska Supreme Court No. 82-725, at 25-26 (emphasis added). The Nebraska Supreme Court rejected the ineffective assistance claim on its merits, but misunderstood this aspect of the claim to be an attack on trial counsel's strategic decision to advise Harper to cooperate with the police.

> Corrigan permitted Harper to advise the court as to the carcinogenic agent used to poison the individuals, including the three who had not died but who could not be adequately treated unless information as to the agent was quickly known. The court permitted Harper to disclose this information but ordered that the fact that he did so could not be used as evidence in the trial. Harper now contends that this was ineffective assistance of counsel. There is simply no basis for that claim. The refusal of Harper to disclose that information would have only served as an aggravating circumstance. To now suggest that Corrigan should not have permitted Harper to disclose the information is totally without basis. The lives of the three individuals hung in the balance. Effective assistance of counsel does not require such callous behavior as suggested by Harper.

State v. Harper, supra, 214 Neb. at 915 (emphasis added).

Harper's claim of ineffective assistance here, as below, is based upon trial counsel's failure to present police testimony that would have demonstrated Harper's consistently cooperative behavior, and the prejudice that resulted when the sentencing judge was left with the erroneous impression that Harper did not decide to cooperate with the police until July 2, 1979, the day of the disclosure hearing. Though the Nebraska Supreme Court misinterpreted the ineffective assistance claim, it was clearly raised below and rejected on its merits by the state courts, and thus is properly presented here.

REASONS FOR GRANTING THE WRIT

A. THE COURT SHOULD GRANT THE WRIT TO DETERMINE WHETHER PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPITAL TRIAL WHEN COUNSEL FAILED TO PRESENT CRUCIAL MITIGATING EVIDENCE CONCERNING THE DEFENDANT'S VOLUNTARY COOPERATION WITH THE POLICE, THEREBY LEADING THE SENTENCING JUDGE TO THE ERRONEOUS CONCLUSION THAT THE DEFENDANT FAILED TO COOPERATE, AND TO CONSIDER THAT SUPPOSED LACK OF COOPERATION AS A MAJOR FACTOR IN IMPOSING A SENTENCE OF DEATH.

In cases where trial counsel have made strategic decisions not to present certain defenses or testimony, courts are understandably reluctant to conclude, "from the omniscient perspective of hindsight," that the choice of strategy was so poor as to constitute ineffective representation of counsel. Washington v. Strickland, 693 F.2d 1243, 1251 (5th Cir. 1982), cert. granted 33 Crim.L.Rep. 4073 (June 6, 1983). But when trial counsel makes a strategic choice to concentrate on a particular line of defense, and subsequently fails to adequately prepare or present the evidence in support of that defense, then trial counsel's conduct does amount to a denial of effective representation. Washington v. Strickland, supra, 693 F.2d at 1252. The present case falls in the latter category.

Here trial counsel properly decided on a strategy of emphasizing Harper's voluntary cooperation with the police in an effort to provide information helpful to the doctors. This was Harper's one plausible mitigating factor that might enable him to convince the sentencing judge to spare his life. Corrigan was acutely aware of the importance of making sure that the judge was

aware of Harper's cooperative conduct, and he decided that unless he made a formal record of the disclosure at a hearing, "he [Harper] would not get any credit for making the disclosure." (Postconv. Hearing, Exhibit No. 5, at 29-30). But although he recognized the critical importance of convincing the judge that Harper had consistently cooperated, Corrigan failed to present the testimony of police officers Miller and Thompson, both of whom subsequently confirmed that they would have attested to Harper's full and sincere efforts to provide any and all information requested. (Postconv. Trans. at 27, 42-43). When asked why he failed to call Thompson and Miller as witnesses, Corrigan admitted, "In fact, to be truthful, it never entered my mind ...." (Postconv. Trans. at 76) (emphasis added). Thus Corrigan acknowledged that his failure to present this evidence was an oversight.

The absence of the critical testimony of Miller and Thompson severely damaged Harper's chance of avoiding the death penalty. Operating under an erroneous view of the facts, the sentencing judge decided to impose capital punishment based upon four mistaken beliefs that (1) Harper did not cooperate by identifying the drug until July 2, 1979; (2) Harper ultimately disclosed the identity of the drug only because his attorney convinced him to do so; (3) Harper did not admit to committing the poisoning murders until July 2, 1979; and (4) the State had already identified the drug by the time Harper identified it. But

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the undisputed truth, which Corrigan failed to convey to the judge, was that (1) Harper always cooperated in attempts to identify the drug beginning with the day of his arrest on October 13, 1978; (2) Harper made his own voluntary decision to help identify the drug, and did correctly identify the drug six months before Corrigan was even appointed to represent him; (3) Harper immediately confessed to committing the murders on the day of his arrest, October 13, 1978; and (4) the State did not positively identify the drug until approximately seven months after Harper correctly identified it for them on January 8, 1979.

No reasonably effective attorney would have failed to present the police officers' critical testimony of Harper's cooperative behavior. Corrigan himself recognized that Harper's assistance in identifying the drug was the only potentially mitigating factor that he could argue to the sentencing judge. His failure to present this evidence clearly denied Harper his Sixth Amendment right to effective representation.[2]

---

2 Whether a defendant has received effective assistance of counsel is a mixed question of fact and law. Westbrook v. Zant, 704 F.2d 1487, 1498 (11th Cir. 1983); Adams v. Jago, 703 F.2d 978, 980 (6th Cir. 1983); Hawkman v. Parratt, 661 F.2d 1161, 1166 (8th Cir. 1981); Washington v. Watkins, 655 F.2d 1346, 1352 (5th Cir. 1982); Harris v. Oliver, 645 F.2d 327, 330 n.3 (5th Cir. 1981); Norris v. Wainwright, 588 F.2d 130, 134 (5th Cir.) cert. denied 444 U.S. 846, 62 L.Ed.2d 60, 100 S.Ct. 93 (1979); United States v. Gray, 565 F.2d 881, 887 n.18 (5th Cir.), cert. denied 435 U.S. 955, 55 L.Ed.2d 807 (1978); Trahas v. Estelle, 544 F.2d 1305, 1314 (5th Cir. 1977) (Goldberg, J., specially concurring); Mason v. Balcom, 531 F.2d 717, 721-23 (5th Cir. 1976); Lee v. Hopper, 499 F.2d 456, 462 (5th Cir.), cert. denied 419 U.S. 1053, 42 L.Ed.2d 650, 95 S.Ct. 633 (1974). Cf., Cuyler v. Sullivan, 446 U.S. 335, 342, 64 L.Ed.2d 333, 100 S.Ct. 1708 (1980).

"[T]he precise question of whether a particular accused has been deprived of the effective assistance of counsel is ultimately an issue of law." United States v. Cannon, 553 F.2d 1052, 1057 (7th Cir.), cert. denied sub nom 434 U.S. 874, 54 L.Ed.2d 153, 98 S.Ct. 221 (1977), quoted in Hawkman v. Parratt, supra, 661 F.2d at 1166. Thus an appellate court may substitute its own judgment for that of the court below. Westbrook v. Zant, supra, 704 F.2d at 1498. "[A] federal court is free to reach a legal conclusion which is different than one reached by the state courts." Hawkman v. Parratt, supra, 661 F.2d at 1167-68.

B. THE COURT SHOULD GRANT THE WRIT TO RESOLVE THE ISSUE AS TO WHICH PARTY BEARS THE BURDEN OF PROVING WHETHER THE DEFENDANT WAS PREJUDICED BY THE DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL. THIS ISSUE IS NOW PENDING BEFORE THE COURT IN WASHINGTON V. STRICKLAND.

1. There Is No Consensus As To How To Allocate The Burden Of Prejudice To The Defendant.

As recent decisions of the Fifth Circuit and D.C. Circuits illustrate, there is no current consensus on how to allocate the burden of proof on the issue of whether the denial of effective assistance of counsel caused the defendant to suffer prejudice which requires reversal.

In Washington v. Strickland, supra, the Justices of the Fifth Circuit reached several different conclusions. Judge Vance reviewed the opinions of other courts and found that he had a choice between endorsing any one of the following standards:

(a). The Chapman Standard. For most constitutional violations, the existence of prejudice is presumed, but the State may rebut the presumption if it makes a showing of harmlessness beyond a reasonable doubt. See Chapman v. California, 386 U.S. 18, 24, 17 L.Ed.2d 705, 87 S.Ct. 824 (1967). This test is endorsed by Judges Robinson, Bazelon and Skelly Wright of the D.C. Circuit.

(b). The Decoster Plurality Standard. In United States v. Decoster, 624 F.2d 196, 208 (D.C. Cir. 1979)(en banc), a four judge plurality opinion authored by Judge Leventhal set forth a standard which requires the accused "to bear the initial burden of demonstrating a likelihood that counsel's inadequacy affected the outcome of the trial. Once the appellant has made this initial showing, the burden passes to the government, and the conviction cannot survive unless the government demonstrates that

it is not tainted by the deficiency, and that in fact no prejudice resulted." Judges Mackinnon, Tamm and Robb concurred in the result reached by Judge Leventhal, but adhered to a stricter rule "that the burden of proving prejudice from defense counsel's ineffectiveness rests on the accused." 624 F.2d 196, 244 (Mackinnon, J., concurring). While Leventhal believed the defendant need only show a likelihood of prejudice, MacKinnon required proof of actual prejudice.

Judge Robinson disagreed with both these approaches, and concluded that the normal Chapman burden of proof rule should apply. 624 F.2d 1196, 247, 260-61 (Robinson, J., concurring in the result). "This means of course, that the burden rests on the Government to prove absence of harm to the accused, and to prove it beyond a reasonable doubt." Id. at 261. Judges Bazelon and Skelly Wright agreed with Judge Robinson.

(c). The Strickland Standard. Judge Vance rejected both the Chapman test and the Decoster standard approved by Judge Leventhal. Instead he concluded that a defendant must show that he suffered "actual and substantial detriment to the conduct of his defense," and that if he meets this burden, the burden then shifts to the government to show that "the detriment suffered was harmless beyond a reasonable doubt." 693 F.2d at 1263-64.

Judges Tjoflat and Clark disagreed and felt the appropriate rule was "whether the mitigating evidence counsel failed to produce would have substantially or materially affected the decision making process of a rational sentencer." 693 F.2d at 1270.

The approach adopted by the four judge plurality in Decoster was criticized by a plurality of the judges of the Fifth Circuit because it placed the burden on the defendant to show a

"likelihood that counsel's inadequacy affected the outcome of the trial." 624 F.2d at 208. The Fifth Circuit plurality attacked this standard, adhering to the Fifth Circuit's long-established rule that a defendant "suffering inadequate counsel need not show to receive a new trial that adequate counsel would change the result on retrial." Washington v. Strickland, supra, 693 F.2d at 1261. In rejecting the "outcome-determinative" test of Decoster, the Fifth Circuit plurality noted that while it is fair to require the defendant to show what evidence could have been presented in his favor, he is no better situated than the State to demonstrate that such evidence would have been likely to affect the outcome of the trial. Rejecting the Decoster test, Judge Vance concluded:

> We believe that where the petitioner has shouldered the considerable burden of showing a violation of his Sixth Amendment rights, that resulted in actual and substantial disadvantage to his case, it is inequitable to encumber him with the further responsibility of showing that the disadvantage determined the outcome of the entire case.

Washington v. Strickland, supra, 693 F.2d at 1262.

Instead, the Fifth Circuit held the defendant was required to prove that he suffered actual harm, but was not required to prove that the harm suffered ultimately determined the outcome of his trial. The Strickland standard "reserves for the State the ultimate burden of showing that any constitutional error that did occur was harmless beyond a reasonable doubt." 693 F.2d at 1262.

Judges Tjoflat and Clark also rejected the outcome-determinative test approved by the D.C. Circuit,

> because it "would require that the court hearing the ineffective assistance claim put itself in the place of the trial court factfinder in an attempt to predict with some considerable degree of accuracy what the factfinder would have done had it been presented with different evidence. We think that a framework for analysis which would inevitably require us, in determining whether the petitioner has made out a prima facie case for habeas relief, to engage in such highly speculative re-creations and revisions of trial court proceedings is to be avoided rather than embraced."

Washington v. Strickland, supra, 693 F.2d at 1271 (Tjoflat, J., concurring), quoting Washington v. Strickland, 693 F.2d 879, 901 (5th Cir. 1982).

While Judge Tjoflat rejected the Decoster standard because it was outcome-determinative, he also rejected the Strickland plurality standard because he believed it was internally inconsistent. If the defendant proved that his attorney's inadequacy caused him "actual and substantial detriment," then it would be "logically impossible also to find that this prejudice was harmless beyond a reasonable doubt. Similarly, if the court finds that petitioner's alleged prejudice was harmless beyond a reasonable doubt, then it cannot also find that petitioner proved this prejudice by a preponderance of the evidence." 693 F.2d at 1274 n.23 (Tjoflat, J., concurring).

Finally, Judge Tjoflat criticized the Strickland plurality for confusing the burden of proof rules applicable to collateral attack proceedings with those applicable to direct appeals. Tjoflat observed that "Chapman arose from a direct appeal of a decision by the California Supreme Court." Strickland, 693 F.2d at 1274 n.23 (Tjoflat, J., concurring). Thus Tjoflat implied that the Chapman test was proper for cases on direct appellate review, but not for habeas corpus proceedings in federal court. In the case at bar, petitioner Harper is seeking direct appellate review of the decision of the Nebraska Supreme Court, a factor which militates in favor of a straightforward application of the Chapman harmless error rule. Decoster, like the present case, also involved a direct appeal. In Decoster, three judges (Bazelon, Robinson and Skelly Wright) argued for application of the Chapman harmless error rule.

2. The Prejudice Test Applied By The Nebraska Supreme Court Is In Conflict With All Other Tests Devised By The Federal Courts.

In affirming the denial of postconviction relief requested by Harper, the Nebraska Supreme Court adhered to its established rule that "the defendant must show that he suffered prejudice in the defense of his case as a result of his attorney's actions or inactions." State v. Harper, 214 Neb. 911, 916, 336 N.W.2d 597 (1983). Accord State v. Pope, 213 Neb. 645, 330 N.W.2d 747, 748 (1983); State v. Hunt, 212 Neb. 304, 322 N.W.2d 624, 627 (1982); State v. Journey, 207 Neb. 717, 301 N.W.2d 82, 87 (1981); State v. Mays, 203 Neb. 487, 279 N.W.2d 146 (1979); State v. Long, 202 Neb. 9, 272 N.W.2d 775, 777 (1978). The standard employed by Nebraska state courts thus requires proof of actual prejudice, and appears to focus on the effect of attorney incompetence on the outcome of the trial. Thus the Nebraska prejudice standard is in conflict with all of the federal court standards previously discussed.

Unlike the Decoster plurality, Nebraska courts require proof of actual prejudice. This is a step beyond the Decoster requirement which requires only proof of a likelihood of prejudice affecting the outcome of the trial. This is several steps beyond the Strickland test which requires merely proof of actual detriment, and then shifts the burden to the State to prove beyond a reasonable doubt that the detrimental effect did not determine the outcome of the defendant's trial. And finally, the Nebraska state court prejudice test is far more onerous for defendants than either Judge Tjoflat's test, or the normal harmless error rule of Chapman v. California, supra.

3. The Evidence Of Prejudice Contained In The Record In This Case Satisfies All Of The Federal Court "Prejudice" Tests.

The record below conclusively establishes that the failure to present the testimony of police officers Thompson and Miller would satisfy the prejudice tests of Decoster, Strickland, Chapman, and the test devised by Judge Tjoflat. If Corrigan had presented this evidence at the mitigation hearing, clearly there is a "likelihood" that the sentencing judge might have decided not to impose the death penalty. (Decoster). Similarly, the failure to present the evidence caused an "actual and substantial detriment" to Harper's mitigation hearing defense that he consistently cooperated with the police. (Strickland). And given the remarks of the sentencing judge, it is evident that production of the missing evidence would have "materially affected the decision-making process of a rational sentencer." (Tjoflat test).

The only test that Harper could not meet is the test imposed upon him by the Nebraska Supreme Court. He could not show that the outcome of the mitigation hearing was necessarily affected by his attorney's failure to present the police testimony. One can only speculate as to whether the judge would necessarily have spared Harper's life had he heard the missing testimony. And similarly, it is precisely because no one can state with any significant degree of certainty what the sentencing judge would have done, that the State of Nebraska could never possibly satisfy the Chapman test of proving, beyond a reasonable doubt, that Harper would have been sentenced to die even if the police testimony had been presented.

4. The Nebraska Supreme Court Erred In Placing The Burden Of Proof To Show Prejudice On Harper.

This Court has consistently recognized that it is impossible to accurately measure the degree of prejudice sustained by a defendant who is denied his Sixth Amendment right to counsel. See Hamilton v. Alabama, 368 U.S. 52, 55, 7 L.Ed.2d 114, 116-17, 82 S.Ct. 157, 159 (1961) ("the degree of prejudice [from the absence of counsel at arraignment] can never be known"); Williams v. Kaiser, 323 U.S. 471, 475, 89 L.Ed. 398, 402, 65 S.Ct. 363 (1945) ("we cannot know the degree of prejudice which the denial of counsel caused"); Glasser v. United States, 315 U.S. 60, 75-76, 86 L.Ed. 680, 702, 62 S.Ct. 457 (1942) ("[t]o determine the precise degree of prejudice sustained by [the defendant] as a result of [appointed counsel's conflict of interest] is at once difficult and unnecessary"). Yet here the Nebraska Supreme Court has required Harper to prove the unprovable, by demanding proof that he would not have been sentenced to die if his attorney had not failed to present the testimony of the police officers.

5. Conclusion

The Nebraska Supreme Court has applied a burden of proof rule which conflicts with the rules adopted by the D.C. Circuit and the Fifth Circuit, and which conflicts with the prior decisions of this Court in Hamilton, Williams, and Glasser. The question of how to properly allocate the burden of proof on the issue of prejudice stemming from ineffective representation of counsel is currently before this Court in the case of Washington v. Strickland, supra. The failure of Petitioner's attorney to present the evidence of Harper's cooperation with the police constitutes far stronger proof of ineffective representation than trial counsel's failure to present character evidence at the sentencing phase of the defendant's trial, which is at issue in

the Strickland case. And finally, the case at bar involves a direct appeal from a state court, rather than a collateral attack on a state court judgment brought by means of a habeas corpus petition.

Petitioner suggests that the correct test for measuring prejudice is simply to apply the harmless error rule of Chapman v. California, supra. This Court should grant the writ requested in order to correct the failure of the Nebraska Supreme Court to correctly allocate the burden of proof. In the event that this Court's decision in Strickland resolves the burden of proof issue in this case, this Court may wish to simply grant the writ of certiorari requested here, and remand with instructions to reconsider in light of its decision in Strickland.

C. THE COURT SHOULD GRANT THE WRIT TO DETERMINE WHETHER THE NEBRASKA STATE COURTS ERRED IN MEASURING ATTORNEY COMPETENCE AGAINST A VARIABLE STANDARD OF ATTORNEY CONDUCT BASED UPON THE PREVAILING LEVEL OF COMPETENCE IN THE PARTICULAR GEOGRAPHICAL AREA WHERE THE TRIAL OCCURRED.

The Nebraska Supreme Court has consistently measured the constitutional adequacy of defense counsel representation by ascertaining whether counsel performed "at least as well as one with ordinary criminal law skill and training in his or her region." State v. Pope, supra, 330 N.W.2d at 748; State v. Jones, 213 Neb. 1, 328 N.W.2d 166, 172 (1982); State v. Leadinghorse, 192 Neb. 485, 222 N.W.2d 573, 577 (1974). In the present case, the Nebraska Supreme Court expressly stated that the performance of Harper's counsel was to be measured against the ordinary standard of competence for lawyers in his area of the State. State v. Harper, supra, 214 Neb. at 915. Although no evidence was ever presented as to the ordinary level of competence amongst criminal law attorneys in Douglas County, Nebraska, the Nebraska Supreme Court concluded that Corrigan's performance satisfied applicable local Nebraska state standards.

The standard of attorney competence, however, must meet a federal constitutionally required minimum standard. This standard does not vary from one locality to another. There may be entire counties where all the criminal lawyers routinely fail to provide constitutionally adequate representation, while simultaneously each lawyer might perform equally as well as his other local colleagues. But when the average lawyer's performance is incompetent, it does not cease to be incompetent merely because incompetence is routine.

In Hawkman v. Parratt, 661 F.2d 1161, 1167 (8th Cir. 1981), the Court of Appeals rejected the Nebraska state courts' formulation of the applicable effectiveness standard. The Nebraska Supreme Court had upheld the trial attorney's performance as adequate when measured against the performance of the ordinary criminal law lawyer in the area of Valentine, Nebraska. The Eighth Circuit observed, however, that "the counsel effectiveness standards set forth above are federal constitutional requirements which do not vary from one geographical location to another. FN 4: We have never indicated that counsel effectiveness standards vary between different geographical areas."

Notwithstanding the Hawkman decision, the Nebraska Supreme Court adhered to the geographically variable standard in its subsequent decision in the case at bar. The use of a variable standard by Nebraska state courts is impermissible and warrants reversal of the judgment of the Nebraska Supreme Court. The only appropriate federal constitutional standard is representation by an attorney who exhibits the "skills and diligence that a reasonably competent attorney would perform under similar circumstances." United States v. Easter, 539 F.2d 663, 666 (8th Cir. 1976). Or, as the Fifth Circuit has put it, the Sixth Amendment requires "counsel reasonably likely to render and

rendering reasonably effective assistance given the totality of the circumstances." Washington v. Strickland, supra, 693 F.2d at 1250; Herring v. Estelle, 491 F.2d 125, 127 (5th Cir. 1974); MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960), adhered to en banc 289 F.2d 928 (5th Cir.), cert. denied 368 U.S. 877, 7 L.Ed.2d 78 (1961).

Because the Nebraska Supreme Court applied an erroneous geographically variable standard of competence, this Court should issue a writ of certiorari and reverse the judgment below, in order to insure that a nationally uniform standard of competence is satisfied in all fifty states.

CONCLUSION

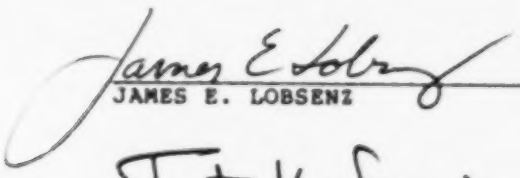
Due to the incompetency of his trial counsel, Petitioner Harper has been sentenced to death by a judge who was never apprised of Harper's consistent sincere efforts to help police identify the toxin which threatened the lives of three human beings. Furthermore, trial counsel's incompetence led the judge to erroneously conclude that Harper withheld this badly needed medical information for months, and that the State had already discovered the identity of the drug used by the time Harper named it for them. All of these undisputably false factual assumptions led the judge to conclude that Harper had not demonstrated the existence of any mitigating factor which warranted leniency.

The Nebraska Supreme Court completely failed to understand or to address the substance of Harper's claim of ineffective assistance. Moreover, the state court incorrectly allocated the burden of proof on the issue of prejudice to the defendant. Finally, the court below erroneously measured trial counsel's performance against a geographically variable standard of competence.

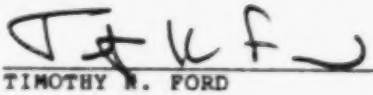
This Court should grant the requested writ of certiorari in order to address these critical Sixth Amendment issues concerning the denial of effective assistance of counsel at the penalty phase of a capital case.

DATED this 26th day of November, 1983.

Respectfully submitted,



JAMES E. LOBSENZ



TIMOTHY K. FORD

Attorneys for Petitioner

No. 83-5815

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1983

STEVEN ROY HARPER,

Petitioner,

vs.

STATE OF NEBRASKA,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Steven Roy Harper, by his undersigned counsel, asks leave to file the Petition for a Writ of Certiorari to the Supreme Court of the State of Nebraska, without prepayment of costs, and to proceed in forma pauperis pursuant to the provisions of Rule 46 of the Rules of this Court.

This motion is based on the attached affidavit of Steven Roy Harper who is presently incarcerated in the Nebraska State Prison, Lincoln, Nebraska.

James E. Lobsinger for Timothy K. Ford

Timothy K. Ford
Attorney for Petitioner
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(206) 622-5942

83-5815

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STEVEN ROY HARPER,

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Respondent.

AFFIDAVIT IN SUPPORT OF MOTION
TO PROCEED IN FORMA PAUPERIS

STATE OF NEBRASKA)
) ss.
COUNTY OF)

I, Steven Roy Harper, being first duly sworn, depose and say that I am the Petitioner in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issue which I desire to present on appeal is the following:

(1) The denial of effective assistance of counsel at the guilt and sentencing phases of my capital trial.

I further swear that the responses I had made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?

ANSWER: NO

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

ANSWER: _____

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

ANSWER: Oct. 1978 $5.00/hr.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

ANSWER: NO

a. If the answer is yes, described each source of income, and state the amount received from each during the past twelve months.

ANSWER: _____

3. Do you own any cash or checking or savings account?

ANSWER: NO

a. If the answer is yes, state the total value of the items owned.

ANSWER: _____

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

ANSWER: NO

a. If the answer is yes, described the property and state its approximate value.

ANSWER: _____

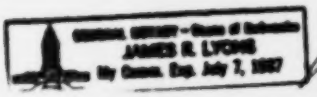
5. List the persons who are dependent upon you for support and state your relationship to those persons.

ANSWER: NONE

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Steven Roy Harper

SUBSCRIBED AND SWORN TO before me this 21st day of Oct, 1983.



NOTARY PUBLIC in and for the State of Nebraska, residing at Lincoln Neb.

APPENDIX A

in the foregoing cases, particularly in view of the fact that in the event conditions change the award can always be modified by the court upon proper application and showing of such change of circumstances. Our conclusion is that the appellant in this case should be given relief from the rather high award of monthly alimony specified by the trial judge so that he may, to a limited degree at least, improve his financial condition. We therefore determine that the award by the trial court in its decree of $1,000 per month alimony for Cynthia should be modified so as to require the payment by Larry to Cynthia of alimony in the amount of $800 per month, in addition to the amount he is required to pay for child support, such monthly alimony to continue for a period of 25 years from the date of the original decree, with the proviso, however, that such alimony shall terminate in the event of her death or remarriage before that time.

Appellee has requested that we award her an attorney fee for the services of her attorney in this court. In view of the circumstances in this case, we award her an attorney fee of $500 for that purpose.

No other errors having been assigned or discussed in this case, we affirm the decree entered by the trial court, as modified.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. STEVEN ROY HARPER, APPELLANT.

304 N.W.2d 663

Filed April 17, 1981. No. 43070.

1. **Death Penalty: Constitutional Law.** The Nebraska death penalty statutes, Neb. Rev. Stat. §§ 29-2519 to 29-2546 (Reissue 1979), do not violate the provisions of the U.S. or Nebraska Constitutions.
2. **Death Penalty: Words and Phrases.** In the context of Neb. Rev. Stat. Ch. 29, art. 25 (Reissue 1979), the word "sentence" in § 29-2521.03 is

construed to mean a sentence of death, and the provisions of that section directing the determination by the Supreme Court of the propriety of a "sentence" by comparison with previous cases are applicable only in a case where a sentence of death has been imposed.

3. Death Penalty. Where a death sentence has been imposed and the Supreme Court is required to determine the propriety of that sentence in such case, the determination of which previous first degree murder cases involve the same or similar circumstances and are therefore comparable will be made by this court on a case-by-case basis.

4. Criminal Law: Evidence. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Stanley A. Krieger for appellant.

Paul L. Douglas, Attorney General, and J. Kirk Brown for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

MCCOWN, J.

The defendant was found guilty on two counts of first degree murder and three counts of poisoning with intent to kill, wound, or maim. After hearings on the constitutionality of the death penalty and the existence of aggravating and mitigating circumstances, a sentence of death was imposed on each of the first degree murder counts and consecutive sentences of 10 years each were imposed on the poisoning counts.

In 1973-74 the defendant, Steven R. Harper, was involved in an emotional relationship with Sandra Johnson, a woman whom he had known since high school. In late 1974 the relationship deteriorated and Sandra told the defendant she intended to marry Duane Johnson. Sandra and Duane Johnson were

married January 17, 1975. A few days later defendant attempted to persuade Sandra to annul her marriage, and when she refused defendant threatened to kill both Sandra and Duane.

On June 21, 1975, Sandra and Duane Johnson and several other members of their family were outdoors at the residence of Sandra's mother, Jean Betten. The defendant drove up to the residence and, after some argument, fired a shotgun at the group and Sandra's mother and brother were struck by shotgun pellets. As a result of the shooting incident the defendant was arrested, charged, and convicted of shooting with intent to kill, wound, or maim. He was sentenced to imprisonment in the penal complex. On November 16, 1977, defendant was paroled, and returned to Omaha.

On March 3, 1978, defendant commenced work at the Eppley Research Institute in Omaha, Nebraska. His job was to take care of the animals which the institute was using in connection with cancer research. While he was employed there the defendant had access to various carcinogenic drugs.

While working at Eppley the defendant lived in his parents' home in Omaha. On August 7, 1978, the Harper family took a dog to the veterinarian clinic and a cat on the next day. Both animals were suffering from symptoms of some type of poisoning which the veterinarian stated he had never seen before. Both animals were treated without success and both died within a few days. Shortly thereafter, on August 18, 1978, the defendant resigned his position at the Eppley Research Institute.

On Saturday, September 9, 1978, Sandra and Duane Johnson were living in a residence on Fontenelle Boulevard in Omaha, Nebraska, with their two children, a son, Michael, who was 3 months old, and a daughter, Sherry, 2 years old. Sandra's sister, Susan Conley, also lived with the family. The Johnson family and Susan left the home around 8 p.m. on

Saturday, September 9, and the family returned home at about 1 a.m. on the morning of September 10. At about 6 a.m. Susan Conley went to the refrigerator and tasted the lemonade from a pitcher but it tasted strange so she spit it out. She then had a piece of pecan pie and poured herself a glass of milk. The milk also tasted odd so she spit it out, too, and dumped the rest of the milk in the sink. Later that morning Sandra and Duane and their daughter, Sherry, got up. Sandra prepared some cereal with milk for Sherry. Duane had a glass of milk and Sandra had nothing to eat or drink.

Immediately after eating her cereal Sherry complained of a stomach ache. Sandra thought nothing of it and she and Sherry went to a shopping center. Sherry suddenly began to vomit and Sandra and Sherry returned home. Meanwhile, Harold Betten, Sandra's father, and Elaine Betten, Sandra's stepmother, had stopped at the Johnson home for a visit. The Bettens had coffee and Harold Betten saw Duane Johnson drink two glasses of some sort of liquid from the refrigerator. Neither of the Bettens had any milk or lemonade. The Bettens were leaving as Sandra and Sherry returned home. Shortly thereafter, Duane became sick and began vomiting, and by noon both Duane and Sherry were quite ill and both were in bed.

About 2 p.m. Sandra's sister, Sallie Shelton, her husband, Bruce Shelton, and their 11-month-old son, Chad, stopped at the Johnson home for a visit. They stayed approximately an hour and they split a glass of lemonade between them. Neither Sandra nor her 3-month-old son, Michael, drank milk or lemonade that day. By evening Duane Johnson, Sherry Johnson, Bruce Shelton, Sallie Shelton, and Chad Shelton were all very ill. Chad Shelton was taken to the hospital on Tuesday, September 12, and died on Thursday, September 14, 1978. His doctors thought the problem might be Reye's syndrome. Duane Johnson was taken to one doctor on September 13 and to

another doctor the next day, at which time he could not walk and was incoherent. He was taken to the hospital and died September 15, 1978.

At that point, with two persons dead and three others extremely ill, the Johnson household was investigated by medical authorities for toxic substances, without any success. Autopsies were performed on the bodies and on Monday, September 18, 1978, a meeting of some 20 doctors and public health officials was held to discuss the situation. They determined that on September 10, 1978, 10 people had been in the Johnson household and 5 of them, within 8 days, were either dead or ill while the other 5 were apparently healthy. Of the 5 people who were affected, all of them drank either milk or lemonade while at the Johnson household. Of the 5 who were not affected, none of them had consumed any milk or lemonade at the Johnsons on that day. At this point the matter was brought to the attention of the Omaha police.

The police began a homicide investigation. They discovered, among other things, the 1975 shooting incident and they received a report from the Center for Disease Control in Atlanta, Georgia, which indicated that whatever the substance was which had killed Chad Shelton and Duane Johnson, it was of a toxic nature and might well have been some type of carcinogenic drug. The report suggested checking with the Eppley Research Institute. The director, after having the situation explained to him, suggested the substance dimethylnitrosamine as the possible toxic agent. Dimethylnitrosamine is a carcinogen used to induce cancer in the liver.

With the evidence which the police had by that time, they obtained a warrant to search the defendant's home on October 3, 1978. The search revealed several empty animal cages of the type used at Eppley and two empty vials of the kind used at Eppley. Tests revealed that one vial had contained a mixture of a salt of arsenic and dimethylbenzanthracene, and the

other vial contained dimethylaminobenzaldehyde. One was a carcinogen which was stored, along with dimethylnitrosamine, in a locked refrigerator on the sixth floor of the Eppley Research Institute in an area where the defendant had worked. The key was in a receptacle next to the refrigerator.

In a long series of tests and detailed studies and by the testimony of medical forensic experts, the toxic substance which killed Chad Shelton and Duane Johnson and poisoned the other three individuals was identified as dimethylnitrosamine, a carcinogen. Dimethylnitrosamine is an extremely toxic liquid, comparatively tasteless and lethal in small quantities, which attacks the liver and disrupts the blood clotting mechanism.

Following the search of the defendant's home a warrant for his arrest was issued. On October 13, 1978, the defendant was arrested in Beaumont, Texas, and later returned to Nebraska for trial.

At the trial William Trout, a former inmate at the penal complex who became acquainted with the defendant during the defendant's imprisonment for the 1975 shooting incident, testified as a witness for the State. Trout testified that while he and the defendant were together at the penal complex the defendant told Trout that he had tried to kill his girl friend and that if he could not have her no one could.

Trout was sent to Omaha, Nebraska, on work release detail about May 1, 1978, and at that time renewed his friendship with the defendant, who had been previously paroled in November 1977. Trout saw and visited with the defendant five or six times during the summer of 1978 and also talked to the defendant on the telephone from time to time.

Trout testified that in early June 1978 in one of their conversations the defendant told Trout that in his job he had access to some very lethal drugs which would be extremely effective for use in murder. The

defendant indicated to Trout that he wanted to use the drugs to kill his former girl friend. In another conversation the defendant also told Trout that he had subjected his family cat and dog to the drugs and both had died. Trout also testified that in the last conversation that he had with the defendant while in Omaha, which occurred on Labor Day weekend 1978, the defendant said he was going to enter his girl friend's house and poison the food. The defendant told Trout that he would put the substance in something in the refrigerator which would disguise the taste of the drug.

Trout was placed on final parole September 13, 1978, and went to California on the same day. Trout testified that on October 3, 1978, he received a telephone call from the defendant from Beaumont, Texas, in which the defendant told Trout that he was about to be arrested. When Trout asked why, the defendant told him that he had gone to his former girl friend's house and put the substance in the food and that there were deaths in the family and defendant had left Omaha because he was under suspicion.

Trout did not offer any information to the police, although he knew of the crime by reading the Omaha newspaper. Trout testified under a promise that no charges would be filed against him. The defendant did not testify at the trial. One witness testified for the defense that she was with the defendant in a bar from approximately 7 p.m. September 9, 1978, until 2 a.m. September 10, 1978.

The jury found the defendant guilty on all counts. A sentence of death was imposed on each of the first degree murder counts and consecutive sentences of 10 years' imprisonment on each of the poisoning counts, and this appeal followed.

The major portions of the defendant's arguments on appeal are directed at the constitutionality of the death penalty and the constitutionality of the statutes of Nebraska dealing with its imposition. Virtually

all of the defendant's challenges have been dealt with previously by this court, including the issues of aggravating and mitigating circumstances set out in Neb. Rev. Stat. § 29-2523 (Reissue 1979). We see no point in reviewing these principles again. See, *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977); *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867 (1977); *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977); *State v. Otey*, 205 Neb. 90, 287 N.W.2d 36 (1979); *State v. Anderson and Hochstein*, 207 Neb. 51, 296 N.W.2d 440 (1980).

The defendant contends that the case of *Godfrey v. Georgia*, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980), raises additional issues as to whether the defendant's conduct in the present case was especially heinous, atrocious, and cruel, or manifested exceptional depravity. In *Godfrey* the victims died instantly when shot and no other assault or infliction of physical pain preceded the death of either victim. The single aggravating circumstance found by the Georgia court to be present was that the killing was "outrageously or wantonly vile, horrible, and inhuman." In applying the facts of the case to the aggravating circumstances finding under rules previously set down by the Georgia court, the Supreme Court of the United States found no way to distinguish the *Godfrey* case in which the death penalty was imposed from the many cases in which it was not. We believe there is little or no relationship between *Godfrey* and the case at bar.

In the case now before us the sentencing court found four specific statutory aggravating circumstances present and no mitigating circumstances. The District Court found: (1) The defendant had previously been convicted of another crime involving the use of violence to the person; (2) The murders were especially heinous, atrocious, and cruel, and manifested exceptional depravity by ordinary standards of morality and intelligence. In that respect the court found that

the murders of Duane Johnson and Chad Shelton were both "conscienceless" and "pitiless" and were "unnecessarily torturous to the victim." After detailing the physical facts, the court found that each of the victims had died a slow and agonizing death, and that the imposition of extreme suffering on each of them resulted from the defendant's acts. The trial court also found that the murders were so coldly calculated as to indicate a state of mind totally and uselessly bereft of regard for human life; (3) At the time the murder was committed the defendant also committed another murder; and (4) The defendant knowingly created a great risk of death to at least several persons. The sentencing court found no mitigating circumstances present, and we can find no error in the sentencing court's assessment of either the aggravating or the mitigating circumstances. *Godfrey* has no application to the case at bar.

The defendant also urges us to reconsider our interpretation of 1978 Neb. Laws, L.B. 711, codified as part of Neb. Rev. Stat. Ch. 29, art. 25 (Reissue 1979), as to which homicide cases will be reviewed, analyzed, and compared in a case where a sentence of death has been imposed. We decline to do so and we reaffirm our holdings in *State v. Williams*, 205 Neb. 287 N.W.2d 18 (1979).

The obligation of this court to determine the propriety of a death sentence in each case and to determine which prior first degree murder cases involve the same or similar circumstances embodies the exercise of the constitutionally imposed duty of the judiciary to determine in each case whether the conviction was lawful and whether a death sentence was legally and constitutionally imposed. Under the Constitution, so long as the death penalty is authorized by law and its imposition is left, under law, to the discretion of the judiciary, the ultimate determination of whether the death penalty was legally and constitutionally imposed in any case must remain a matter for judicial

rather than legislative determination.

The defendant next contends that the trial court erred in ruling that certain statements of the defendant, taken in violation of *Miranda* requirements and inadmissible in the State's case-in-chief, could be used for impeachment of the defendant on rebuttal if a proper foundation were laid. The defendant asserts that except for the erroneous ruling of the trial court, the defendant would have testified at trial.

The statements involved were inculpatory, one of them having been made in Beaumont, Texas, on October 13, 1978, and one made in Omaha, Nebraska, on January 8, 1979. On both occasions the police knew that the defendant was represented by counsel and that counsel had directed that there was to be no interrogation. The statements were obtained after the defendant had repeatedly refused to make a statement without the presence of his attorney. In connection with at least one statement the police promised the defendant that any statement made would never be used against him. At the hearing on the motion to suppress the District Court quite properly suppressed both statements and they were not admitted at the trial.

The U.S. Supreme Court has held that a statement of a defendant taken in violation of *Miranda* and, therefore, inadmissible in the case-in-chief may be used for impeachment purposes to attack the credibility of defendant's trial testimony if its trustworthiness meets legal standards. *Harris v. New York*, 401 U.S. 222, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971); *Oregon v. Hass*, 420 U.S. 714, 95 S. Ct. 1215, 43 L. Ed. 2d 570 (1975). We see no reason to extend the rule in Nebraska beyond the constitutional requirements laid down by the Supreme Court of the United States in *Harris* and *Hass*. In the case at bar, however, the issue is not properly before us. The trial court's ruling as to the admissibility of the statements in rebuttal was prospective only and the statements

were never offered or admitted at trial for any purpose.

The defendant also contends that the court erred in failing to grant a mistrial because of improper comments by the prosecutor in closing argument. During the final summation to the jury the prosecutor said: "Another aspect of the thing is that whoever did this — It's — It's not a secret that these people are sick, and it's not a secret that people have died. All along, you know, the person that did it can do one thing. He can say 'Yeah, substance used was this, so I'm going to help . . . .'" At this point the defense objected and moved for a mistrial. The trial court denied the motion for mistrial and immediately instructed the jury to disregard the statement. At the conclusion of the trial, as a part of the comprehensive instructions, the jury was specifically instructed that they were to draw no conclusions or inferences from the fact that the defendant had not testified in the case and that they were entitled to draw no conclusions or inferences as to his reasons in that regard.

The defendant relies upon the holding in *Griffin v. California*, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965), which forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt. We do not condone comment by the prosecution on the silence of the accused, whether the comment is direct or indirect, but under the circumstances here, where the evidence of guilt was overwhelming and the trial court specifically struck the comment and instructed the jury to disregard the statement and later gave a correct and proper instruction on the failure to testify, we are constrained to find that the error, if any, was not prejudicial within the meaning of *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

The defendant also contends that the trial court erred in admitting evidence of the 1975 shotgun

assault. Under Neb. Rev. Stat. § 27-404 (Reissue 1979), evidence of other crimes, wrongs, or acts may be admissible for purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. In the case at bar the evidence of the 1975 crime was clearly admissible under the statute. See *State v. Hitt*, 207 Neb. 746, 301 N.W.2d 96 (1981).

The final issue in the case at bar is whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. See Neb. Rev. Stat. § 29-2522 (Reissue 1979).

We have previously noted that the sentencing court found four statutory aggravating circumstances present and no mitigating circumstances. The defendant was a 25-year-old college graduate at the time these crimes were committed. His only prior criminal conviction was for the 1975 incident shown in the record here. The sentencing court meticulously considered each of the statutory aggravating and mitigating circumstances and made written findings of fact based upon the records of the trial as required by statute. Some of those findings have been previously set out. The sentencing court's finding that the murders of Duane Johnson and Chad Shelton were so coldly calculated as to indicate a state of mind totally and senselessly bereft of regard for human life appropriately summarizes the facts of this case.

Our review of first degree murder convictions finds no case which is factually comparable to the case at bar. Any objective weighing and balancing of aggravating and mitigating circumstances and comparison to the other death penalty cases now pending in this state establishes that the death sentence in the case now before us is not excessive or disproportionate to death penalties imposed in other death penalty cases under any measure of comparison.

The defendant's remaining assignments of error are without merit and the convictions and sentences are affirmed.

AFFIRMED.

KRIVOSHA, C.J., concurring in part, and in part dissenting.

I find that once again, I must in part concur with and in part dissent from the majority in its decision concerning the proper disposition of a case involving the commission of a first degree murder. See, *State v. Holtan*, 205 Neb. 314, 287 N.W.2d 671 (1980); *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979); *State v. Otey*, 205 Neb. 90, 287 N.W.2d 36 (1979); *State v. Peery*, 205 Neb. 271, 287 N.W.2d 71 (1980); *State v. Rust*, *ante* p. 320, 303 N.W.2d 490 (1981).

I concur with the majority's finding that the judgment of conviction should be affirmed, and likewise concur with the majority's conclusion that the trial court did not err regarding the admitting into evidence of certain statements made by the appellant. I likewise concur in the majority's conclusion that the trial court did not err in refusing to declare a mistrial because of allegedly improper comments by the prosecutor in closing argument.

With regard to the matter of the admissibility of the evidence of the 1975 gunshot assault, I likewise concur with the majority that in the instant case the evidence of the 1975 gunshot assault was relevant to prove motive and, therefore, admissible under the provisions of Neb. Rev. Stat. § 27-404 (Reissue 1979). I do not, however, believe that we should leave the impression that merely because evidence may in some manner be relevant to any one of the various noted exceptions, though the prosecution does not know which one, such evidence of prior or subsequent crimes is always admissible. See dissent of Krivosha, C.J., in *State v. Ellis*, *ante* p. 379, 399, 303 N.W.2d 741, 753 (1981).

It is with regard to the imposition of the death penalty in this case that I must dissent. My disagreement with the majority is not because I do not believe the crime committed to be atrocious and deplorable. Quite to the contrary, I believe the crime to be flagrant and shocking. But emotions may never cancel the Constitution.

I remain firm in my view that the imposition of the death penalty is not, per se, cruel and unusual punishment in violation of the eighth amendment. *Proffitt v. Florida*, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976). I likewise remain firm in my belief that the imposition of the death penalty is not immoral or unethical. See dissent in *State v. Williams*, *supra*.

Moreover, I am now convinced that there are indeed some instances, though extremely limited, when the imposition of the death penalty is constitutionally permissible. I believe that "killers for hire" may be executed as a consequence of their conviction. See *State v. Anderson and Hochstein*, 207 Neb. 51, 296 N.W.2d 440 (1980). There may be other limited categories which have not as yet been presented to the court for consideration. As to those, I shall reserve comment at this time.

However, I have now concluded that under the limitations imposed upon courts by both the federal and state Constitutions, the imposition of the death penalty as now applied in most other instances is arbitrary and capricious and not permitted.

As I noted in my dissent in *State v. Rust*, *supra*, even disregarding the provisions of 1978 Neb. Laws, L.B. 711, now Neb. Rev. Stat. §§ 29-2521.01 et seq. (Reissue 1979), the death penalty is generally in violation of one's constitutional rights prohibiting the imposition of the death penalty in an arbitrary and capricious manner.

In *State v. Rust*, *supra* at 327, 303 N.W.2d at 495, I observed: "A reading of the various opinions rendered in the case of *Furman v. Georgia*, 408 U.S. 238, 92

S. Ct. 2726, 33 L. Ed. 2d 346 (1972), makes it manifestly clear that the adoption of statutes such as Neb. Rev. Stat. § 29-2522 (Reissue 1979), and the provisions of L.B. 711, are simply a response to the United States Supreme Court's recognition that it is a violation of an individual's constitutional rights when the decision to execute is arrived at in an arbitrary and discriminatory manner. The fact that we may create criteria to aid us in imposing the death penalty does not overcome the constitutional prohibition if, after applying the formula, *we nevertheless continue to impose the penalty in an arbitrary and capricious manner.*" (Emphasis supplied.)

I believe that the language of the majority opinion in *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976), though not reaching my present conclusion, does in fact support that conclusion. It reads in part as follows: "While *Furman* did not hold that the infliction of the death penalty *per se* violates the Constitution's ban on cruel and unusual punishments, it did recognize that the penalty of death is different in kind from any other punishment imposed under our system of criminal justice. Because of the uniqueness of the death penalty, *Furman* held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner. . . . [T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.' [Citation omitted.]

"Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Id.* at 188-89.

As I have noted, examining a host of cases decided

within this jurisdiction makes it clear to me that the imposition of the death penalty in most cases in this state is indeed arbitrary and capricious. See analysis of cases in dissent, *State v. Williams*, *supra*, and *State v. Rust*, *supra*.

Not only does an analysis of those cases referred to in *Williams* and *Rust* lead one to the inescapable conclusion that the imposition of the death penalty is arbitrary and capricious, but a further examination of those cases in which a charge of second degree murder is filed, rather than first degree murder, likewise makes it clear that by the time a case comes to this court for examination there have been a sufficient number of arbitrary decisions made so as to make impossible the imposition of the death penalty in anything other than an arbitrary and capricious manner. While I do not for a moment question the right of the prosecutor to elect the charge to be filed, nor do I for a moment urge any change in that process, I likewise cannot ignore its existence in attempting to rationally analyze whether the death penalty can be imposed in anything other than an arbitrary manner except in very rare instances. I am not unmindful of the fact that this argument has already been rejected by the majority in the *Gregg* case. Nevertheless, I believe that in this respect the majority in *Gregg* is totally in error.

One need only examine two of the cases released by this court this day to note how the matter of prosecutorial discretion of necessity results in the death penalty being arbitrarily imposed. In addition to this case where the penalty of death was imposed, we have this day also announced our decision in the case of *State v. Stranghoener*, *post* p. 598, 304 N.W.2d 679 (1981). In that case we have affirmed a sentence of 20 years given to Stranghoener for second degree murder. The facts of the case, however, indicate to me that the appellant was, indeed, guilty of first degree murder. The facts in the *Stranghoener* case

disclose that Stranghoener, together with several other individuals, carefully, cruelly, and viciously planned the execution of one Jim Goslee, a member of their "family," for no other reason except to test the loyalty of another member of the "family." Stranghoener, though originally charged with first degree murder, was permitted as a part of a plea bargain to plead to the lesser charge of second degree murder and was sentenced to prison for 20 years. While one does not question or quarrel with the right of either the prosecution or the trial court in *Stranghoener*, it is impossible to set this case alongside those cases in which the death penalty has been imposed and discern a rational distinction.

Moreover, the *Stranghoener* case is not an isolated instance. An examination of only a few cases decided since 1973 establishes clear examples of how the imposition of the death penalty in a particular case is mere happenstance. In the case of *State v. Wredt*, *ante* p. 184, 302 N.W.2d 701 (1981), the defendant was permitted to plead guilty to second degree murder of his father. The evidence discloses that the defendant was 16 years old at the time of the commission of the crime. On the evening of the murder the defendant took a .45-caliber revolver outside and waited for his father to come home, which he did shortly after 9 p.m. After the father got out of his truck and started walking toward the house, the defendant stepped out from the corner of the house, aimed and cocked the revolver, and fired one shot into his father's chest which killed him instantly.

In *State v. Rouse*, 206 Neb. 371, 293 N.W.2d 83 (1980), the defendant was permitted to plead guilty to second degree murder as a result of a plea bargain arrangement and was sentenced to a term of 16 to 20 years in the penal complex. Defendant had originally been charged with six felony counts, including one count of first degree murder, one count of felony murder, three counts of burglary, and one count of

escape. The killing was of a police officer apparently seeking to apprehend defendant in connection with the burglary.

In *State v. Thompson*, 199 Neb. 67, 255 N.W.2d 880 (1977), the defendant was permitted to plead guilty to a charge of second degree murder after the State amended the complaint originally charging the defendant with first degree murder. He was sentenced to life imprisonment. The defendant had attended a party at the home of his sister. During the evening an argument developed, a fight broke out, and several guests subdued the defendant by getting him down on the floor. The defendant worked until noon the following day, purchased a .22-caliber semiautomatic rifle and some ammunition, and then returned to his apartment. At about 8 p.m. his niece and sister came to see him. The defendant told them he was going to kill someone, whom he described. Later that evening the defendant walked into his sister's house, carrying the loaded rifle. There were a number of people in the house, including the victim. The defendant pointed the gun at a Mrs. Hicks and said he wanted to talk to her about what had happened the night before. He also pointed the rifle at several other persons in the room. A brief fight ensued, and after it was broken up the victim started to leave the room when the defendant shot him, striking him in the chest near his right shoulder, severing his trachea and several arteries. The victim died almost instantaneously.

In *State v. Laravie*, 192 Neb. 625, 223 N.W.2d 435 (1974), the defendant was charged with first degree murder and pled guilty to a reduced charge of second degree murder. He was sentenced to life imprisonment. The evidence discloses that the defendant broke into a residence in the early morning, picked up a knife from the kitchen table, then entered the bedroom of a 2-year-old child. When the 2-year-old cried out, the defendant stabbed him twice in the chest, causing his death.

In the case of *State v. Reyes*, 192 Neb. 153, 219 N.W.2d 238 (1974), the defendant was permitted to plead guilty to second degree murder pursuant to a plea bargain. He was sentenced to 20 years' imprisonment for the killing. The evidence discloses that the defendant approached the victim on a street corner where he had been standing with a 6-pack in each hand. The defendant shot the victim five times, killing him stantly.

The cases cited above are simply those which were appealed to this court and therefore found in the Nebraska Reports. We have no quick way of determining how many more cases of this nature can be found by examining the various District Court records. To be sure, the appealed and reported cases are not the only instances where this disparity occurs.

While I have already acknowledged that such variances and discretion are not within the control of the courts, and should not be within the control of the courts, I, nevertheless, cannot ignore the reality of those matters in attempting to determine whether the death penalty is imposed in a nonarbitrary and noncapricious manner in this state.

The words of Mr. Justice Stewart in *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 372), seem most applicable to this analysis. At 309-10, he said: "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. . . . I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and freakishly imposed." I likewise must conclude that the Constitution of the United States and the Constitution of the State of

Nebraska cannot tolerate the infliction of a sentence of death to be so wantonly and so freakishly imposed. Recognizing the system to be what it is, and further recognizing that the system must at least for the present remain as it is, I find no other alternative but to conclude that the Constitution of the United States and the Constitution of the State of Nebraska preclude the imposition of the death penalty except in but a few extremely isolated cases.

However, I wish not to be misunderstood by what I have said here. I do not believe that persons convicted of murder should be quickly forgiven and returned to society. Quite to the contrary, I believe that having acted like an animal in the commission of the crime, they should now be restrained as an animal during the balance of their lives. If it is indeed punishment we seek to impose, and I find no fault with that, then requiring them to live out the balance of their lives in a 9- x 6-foot cell, isolated from civilization and any of the benefits of freedom, would indeed be an appropriate punishment.

For me, the question is not whether the convicted should be punished but, rather, whether the form of punishment is permitted under the Constitution. Having now attempted for more than 2 years to glean any reasonable pattern in which one is either selected to be charged with first degree murder or selected to be executed, and being unable to do so, I must conclude our selection process is arbitrary and capricious and therefore invalid. The fact that we act arbitrarily in accordance with standards which we have established to aid us in making our decision, but which in fact repeatedly fail, does not cure the constitutional defects in the scheme.

Concluding, as we have, that all persons who have been ordered executed are treated alike does not address the issue. Discrimination is determined by examining the entire class and not just those who are discriminated against. The class is persons who

have unlawfully killed and not persons sentenced to death. That is what §§ 29-2521.01 et seq. seek to address.

I would sentence the appellant herein to be incarcerated in the penal complex for the balance of his natural life, and I would hope that the Board of Pardons would not commute the sentence so as to make him eligible to be released.

KARIN CONRAD, APPELLANT, V.
PHILLIP C. CONRAD, APPELLEE.

304 N.W.2d 674

Filed April 17, 1981. No. 43288.

1. Child Support. Accrued child support payments are not subject to modification.
2. ____. Remarriage of mother before decree of dissolution became final and her removal of child from the jurisdiction without consent of the court held not to estop mother from collecting accrued child support payments.

Appeal from the District Court for Douglas County: KEITH HOWARD, Judge. Reversed and remanded with directions.

Lawrence H. Yost of Yost, Schafersman, Yost, Lamme & Hillis for appellant.

Richard J. Spethman for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

PER CURIAM.

This is an appeal in a contempt proceeding against the respondent, Phillip Conrad, for failure to pay child support. In response to an order to show cause the respondent filed an application for an order suspending all child support payments due after January

1963. The trial court found that the petitioner, Karin Conrad, was equitably estopped from collecting accrued child support and permanently enjoined the petitioner from attempting to collect all unpaid child support obligations. The petitioner has appealed.

The petitioner and respondent were married on April 13, 1960. A daughter, Debby Anne Conrad, was born November 17, 1960. The petition for dissolution was filed on September 27, 1961, and a decree of dissolution entered on August 3, 1962. The decree awarded custody of the minor child to petitioner and provided that respondent should pay child support in the amount of $10 per week until such time as the minor child reached 21 years of age, became married, or self-supporting. The respondent was granted reasonable visitation rights.

The record indicates that while the dissolution proceeding was pending, the respondent failed to make some of the payments for temporary child support. The respondent testified that he did not make the payments because he was experiencing difficulty in exercising his visitation rights. After the dissolution, the respondent regularly exercised his rights of visitation through December 1, 1962.

On or about September 15, 1962, after the dissolution, the respondent learned that the petitioner planned to remarry and take Debby Anne to Germany. Based on this information the respondent filed an application on September 19, 1962, for a temporary restraining order to prevent the removal of Debby Anne from the court's jurisdiction. On October 18, 1962, a restraining order was granted. The petitioner denied knowledge of this order or of any subsequent pleadings filed by respondent pertaining to support and visitation rights.

On December 9, 1962, the petitioner married Kent R. Warren, a serviceman stationed at Fort Leonard Wood, Missouri. This marriage took place during the 6-month period before the decree of dissolution had become final.

APPENDIX B

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

THE STATE OF NEBRASKA, Plaintiff, -vs.- STEVEN ROY HARPER, Defendant.	)	DOC. 104 NO. 228 O R D E R

The Court, having reviewed the evidence presented at the defendant's hearing under the Nebraska Post-Conviction Act and the defendant's brief in support of his application for relief, finds that:

1. The defendant received effective assistance of competent counsel throughout the criminal proceedings leading to his conviction of the charges herein;
2. The defendant received adequate notice of both aggravating and mitigating circumstances relied upon by the Court in imposing sentence;
3. The imposition of the death penalty was not in violation of the defendant's constitutional rights.

THEREFORE, IT IS ORDERED THAT the defendant's application for post-conviction relief is denied.

Signed this 25th day of October, 1982.

BY THE COURT:

DISTRICT JUDGE

APPENDIX C

nation of the search warrant in this case discloses that even if the observations made by the officers are disregarded, there were more than ample independent facts contained in the affidavit which would have justified the court in granting a search warrant."

Likewise, in the instant case, all the facts contained in the affidavit which are totally independent of any investigation made by Parole Officer Smith are more than sufficient to have justified the issuance of the search warrant. We noted in *Welsh* at 64-65, 332 N.W.2d at 688: "While it is true that the U.S. Supreme Court decision in *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963), not only requires the suppression of the illegally obtained evidence but the 'fruit of the poisonous tree" as well, not all evidence obtained is considered to be 'fruit of the poisonous tree,' and such evidence may be admitted if there is sufficient independent basis for the discovery of the evidence. In *Wong Sun* the U.S. Supreme Court specifically made that distinction when it observed that the constitutional question under the fourth amendment must be examined in light of whether the evidence to which objection is made has been come at by exploitation of the illegally obtained evidence or, instead, by means sufficiently distinguishable to be purged of the primary taint. . . . The application of the independent source rule in the context of a search warrant does not offend the underlying purpose and objectives of the exclusionary rule. See *United States v. Giordano*, 416 U.S. 505, 94 S. Ct. 1820, 40 L. Ed. 2d 341 (1974). In a long line of cases both the U.S. Supreme Court and other federal courts called upon to examine this question have held that where an affidavit used for the purpose of obtaining a search warrant includes both illegally obtained facts as well as facts derived from independent and lawful sources, a valid search warrant may issue if the lawfully obtained facts, considered by themselves, establish

probable cause to issue the warrant. [Citations omitted.]"

As we have already noted, an examination of Sergeant Goodrich's affidavit was more than sufficient to justify the issuing of the warrant. With the exception of paragraph 14, all of the allegations contained in his affidavit were based upon the results of the Omaha Police Department's investigation of the homicide. Paragraph 14 did nothing more than set out that Officer Goodrich had been advised by Parole Officer Smith that Smith had, on two occasions, observed Guilbeault wearing boots of the type believed to be involved in the murder. As a matter of fact, the evidence clearly discloses that Guilbeault had no expectation of privacy with regard to the boots in view of the fact that he wore them publicly and they were in plain sight when taken from him by the police officers at the state police headquarters. *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967). The affidavit filed by Goodrich was clearly sufficient and based upon independent sources; Guilbeault's contention that the warrant was the result of an illegal prior investigation of his property is simply without merit. In view of our disposition of this case, we need not reach any other questions presented by this appeal. The judgment of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. STEVEN ROY HARPER, APPELLANT.

___ N.W.2d ___

Filed July 22, 1983. No. 82-725.

1. **Effectiveness of Counsel.** The standard for determining whether counsel for criminal defendants provided adequate representation is whether trial counsel performed at least as well as lawyers with ordinary training and skill in criminal law in the area and whether they conscientiously protected the interests of their client.

2. _____. The burden of proof in showing incompetence of criminal trial counsel lies upon the party challenging the adequacy of criminal trial representation. Additionally, the defendant must show that he suffered prejudice in the defense of his case as a result of his attorney's actions or inactions.

3. **Post Conviction: Rules of the Supreme Court: Appeal and Error.** Where court-appointed counsel in a post conviction case, after careful and conscientious review of the matter, determines that the appeal is wholly frivolous and without merit, counsel may file a motion in this court, pursuant to Neb. Ct. R. 3B (Rev. 1982), requesting leave to withdraw, supported by a brief and an affidavit setting out the fact that counsel has made a thorough and conscientious examination of the record and has determined the appeal to be without merit and wholly frivolous.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed.

Richard J. Spethman, and Renne Edmunds, for appellant.

Paul L. Douglas, Attorney General, and J. Kirk Brown, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, CAPORALE, and SHANAHAN, JJ.

KRIVOSHA, C.J.

The appellant, Steven Roy Harper, appeals from a judgment entered by the District Court for Douglas County, Nebraska, denying to Harper post conviction relief sought pursuant to Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1979).

Harper was found guilty in 1979 on two counts of first degree murder and three counts of poisoning with intent to kill, wound, or maim. After hearings on the constitutionality of the death penalty and the existence of aggravating and mitigating circumstances, a sentence of death was imposed by the trial court on each of the first degree murder counts and consecutive sentences of 10 years each on the poisoning counts. Harper appealed that judgment and sentence to this court, and in the case of *State v. Harper*, 208 Neb. 568, 304 N.W.2d 663 (1981) (*Harper I*), the convictions and sentences were affirmed.

The details of the murders and poisonings are set out in our former opinion and need not be repeated here.

Thereafter, Harper filed a petition seeking post conviction relief, maintaining that he had not received effective assistance of counsel and that, further, he had not received adequate notice of both the aggravating and mitigating circumstances relied upon by the court in imposing the sentences. He further maintained that the death penalty was in violation of his constitutional rights. As noted above, the trial court rejected all of Harper's claims and he appealed to this court. He assigns as error in this court the fact that the District Court denied his petition for post conviction relief based upon prejudicially ineffective counsel. He also assigns as error that the District Court was wrong in denying his petition for post conviction relief based upon failure to give adequate notice of the aggravating circumstances charged by the prosecutor and relied on by the trial court as the basis for imposing the death penalty in violation of the sixth, eighth, and fourteenth amendments to the U.S. Constitution, and, further, that the imposition of the death penalty violates his rights under the fourteenth amendment to the U.S. Constitution.

We can dispose of his last two issues quickly. The last assignment of error, dealing with the death penalty, was not argued to this court in the post conviction appeal because it was fully argued in *Harper I* and decided by us at that time. We have frequently held that the Post Conviction Act cannot be used as a substitute for a direct appeal or to secure a further review of issues already litigated. See, *State v. Losieau*, 182 Neb. 367, 154 N.W.2d 762 (1967); *State v. Sheldon*, 181 Neb. 360, 148 N.W.2d 301 (1967). With regard to the second assignment of error, our examination of the record discloses that it is wholly without merit. That leaves us, then, with

only the issue of whether Harper was denied effective assistance of counsel.

The basis for the claim of ineffective assistance of counsel is twofold. In the first instance, Harper maintains that he received ineffective assistance of counsel because a defense of insanity was not sufficiently and virgorously pursued. The record simply does not support that claim. We have previously addressed this issue in *State v. Holtan*, 206 Neb. 314, 321, 287 N.W.2d 671, 675 (1980), wherein we said: "Defendant further maintains that counsel was inadequate in that he did not adequately pursue a defense of insanity. The record, however, discloses that counsel not only had the defendant examined by a prominent local psychiatrist but further consulted with psychiatrists in the state of Washington who were familiar with the defendant's condition. That investigation disclosed that while there was evidence of defendant's mental condition, it was not of the type to satisfy the M'Naghten rule followed in this jurisdiction. Even the testimony produced by defendant at the post conviction hearing did not establish grounds upon which the M'Naghten rule could be pursued as a defense. The failure of trial counsel to pursue that defense was not inadequate."

Likewise, in the instant case the record discloses that Harper's trial counsel, Lawrence Corrigan, relied upon the opinion of, at a minimum, five mental health professionals, three of whom saw Harper personally and all of whom concluded that Harper could not successfully assert an insanity defense. At the post conviction hearing no evidence was introduced to support a claim that a defense of insanity would have been either reasonable or successful. Dr. Kentsmith testified at the post conviction hearing on behalf of Harper, "I am not able to state with reasonable medical certainty that Mr. Harper was sane at the time of the crime. There is a great deal of doubt in my mind based on the objective evidence both before the crime and after to suggest that Mr.

Harper may have decompensated into a schizophreniaform [sic] psychotic illness and may not have fully understood the consequences of his act." This evidence is not sufficient to establish that there was a basis for a defense of insanity or that the five mental health specialists consulted by Harper's trial counsel were in error. Nor does the evidence disclose that Corrigan failed in any manner to adequately represent Harper insofar as the defense of insanity was concerned, or that Harper was prejudiced by what was or was not done.

The other aspect of the claim of ineffective assistance of counsel has to do with the fact that Corrigan permitted Harper to advise the court as to the carcinogenic agent used to poison the individuals, including the three who had not died but who could not be adequately treated unless information as to the agent was quickly known. The court permitted Harper to disclose this information but ordered that the fact that he did so could not be used as evidence in the trial. Harper now contends that this was ineffective assistance of counsel. There is simply no basis for that claim. The refusal of Harper to disclose that information would have only served as an aggravating circumstance. To now suggest that Corrigan should not have permitted Harper to disclose the information is totally without basis. The lives of three individuals hung in the balance. Effective assistance of counsel does not require such callous behavior as suggested by Harper.

We have frequently held that the standard for determining whether counsel for criminal defendants provided adequate representation is whether trial counsel performed at least as well as lawyers with ordinary training and skill in criminal law in the area and whether they conscientiously protected the interests of their client. See, *State v. Pope*, 213 Neb. 645, 330 N.W.2d 747 (1983); *State v. Jones*, 213 Neb. 1, 328 N.W.2d 166 (1982). The burden of proof in showing incompetence of criminal trial counsel lies upon

the party challenging the adequacy of criminal trial representation. *State v. Hunt*, 212 Neb. 304, 322 N.W.2d 624 (1982). Additionally, the defendant must show that he suffered prejudice in the defense of his case as a result of his attorney's actions or inactions. *State v. Pope*, *supra*; *State v. Hunt*, *supra*. The evidence in this case fails to disclose either that Corrigan did not act at least as well as lawyers with ordinary training and skill in criminal law in the area or that Harper was prejudiced by any of the claims now made by him. Quite to the contrary, an examination of the record discloses that Corrigan most effectively represented Harper. There simply was no defense to these terrible crimes. The claim of ineffective assistance of counsel is wholly frivolous and without merit.

This case, however, does point up what is becoming an increasingly more difficult task, both for court-appointed counsel, such as those in this case, and this court as well. The difficulty is that, having been appointed, counsel believe that they must make some argument before this court. Oftentimes, as displayed by this case, because trial counsel were indeed so effective, there are no errors to be argued to this court and any appeal is wholly frivolous. Nevertheless, because no errors do in fact exist, appointed counsel on appeal are compelled to make unsupported accusations against trial counsel who were most effective. And this court must then listen to oral argument and write an opinion in a case in which neither oral argument nor a written opinion is necessary or desirable.

It was that very problem which prompted the U.S. Supreme Court in the case of *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), to declare that if counsel appointed to represent one seeking leave to appeal in forma pauperis is convinced, after conscientious investigation, that the appeal is frivolous, he may ask to withdraw on that account, and if the court is satisfied that counsel has

diligently investigated the possible ground of appeal and agrees with counsel's evaluation of the case, then it may allow leave to withdraw and deny leave to appeal. See, also, *Ellis v. United States*, 356 U.S. 674, 78 S. Ct. 974, 2 L. Ed. 2d 1060 (1958). If such a procedure can satisfy the requisite state and federal constitutional rights on a direct appeal, then it would appear that it would likewise be satisfactory in a post conviction appeal, where oftentimes the request for review is of matters which have previously been reviewed on direct appeal. It is for that reason we amended the rules of this court to include actions seeking post conviction relief for which a motion to withdraw pursuant to Neb. Ct. R. 3B (Rev. 1982) could be filed. For that reason we urge that where court-appointed counsel in a post conviction case, after careful and conscientious review of the matter, determines that the appeal is wholly frivolous and without merit, counsel may file a motion in this court, pursuant to Rule 3B, requesting leave to withdraw, supported by a brief and an affidavit setting out the fact that counsel has made a thorough and conscientious examination of the record and has determined the appeal to be without merit and wholly frivolous. Then this court may proceed, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If we find it is so wholly frivolous, we may grant counsel's request to withdraw and affirm the judgment. On the other hand, if we find any of the legal points arguable on their merits and therefore not frivolous, we shall, prior to decision, afford the indigent the assistance of counsel to argue the appeal.

In this way we believe that we can provide indigent defendants with full and fair representation, while avoiding the necessity of appointed counsel making unmeritorious and unsupported attacks on the competence of prior trial counsel.

The judgment of the trial court is affirmed.

AFFIRMED.

SHANAHAN, J., concurs in the result.

STATE OF NEBRASKA, APPELLEE, V. DAVID A. BEASLEY, APPELLANT.

___ N.W.2d ___

Filed July 22, 1983. No. 83-773.

1. **Criminal Law: Appeal and Error.** In a criminal prosecution it is not the province of the Supreme Court to resolve conflicts in the evidence, pass upon credibility of witnesses, determine the plausibility of explanations, or weigh the evidence.
2. **Verdicts.** The verdict of a jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
3. **Sexual Assault: Corroboration.** In a prosecution for sexual assault it is not essential that the victim be corroborated as to the particular act constituting the offense in order to sustain a conviction. It is sufficient if she is corroborated as to material facts and circumstances which tend to support her testimony and from which, together with her testimony, an inference of guilt may be drawn.
4. **Jury Instructions: Lesser-Included Offenses.** Generally, it is not prejudicial error to not instruct upon a lesser offense when the evidence entirely fails to show an offense of a lesser degree than that charged in the information.
5. _____: _____. If, under a "different but reasonable" view, the evidence would be sufficient to establish guilt of the lesser offense and leave a reasonable doubt as to some element included in the greater offense but not the lesser, the jury should be instructed on the lesser offense.

Appeal from the District Court for Lincoln County: HUGH STUART, Judge. Affirmed.

John P. Murphy, Lincoln County Public Defender, for appellant.

Paul L. Douglas, Attorney General, and Dale D. Brodkey, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, CAPORALE, and SHANAHAN, JJ.

BOSLAUGH, J.

The defendant was convicted of sexual assault in the first degree and burglary and was sentenced to concurrent terms of imprisonment for 1 to 3 years. He has appealed and assigned as error the sufficiency of the evidence to support the convictions and the refusal of the trial court to instruct on the lesser-included offenses of sexual assault in the second and third degrees.

The victim testified that early on the morning of March 10, 1982, she was awakened at her home by the defendant, who was lying on top of her with his hands around her neck. She testified that he said he would kill her if she did not have intercourse with him; that he tore off the bedclothes and her pajamas and underwear; that he forced his fingers into her vagina; and that he forced his penis into her mouth. The victim struggled, managed to get away, and ran to the house next door where she was admitted by the neighbors. The victim estimated that the attack lasted 20 minutes.

The neighbors, Tony and Linda, testified that when the victim knocked on their door at about 6 a.m. on March 10, 1982, she had nothing on but her socks. The victim appeared upset and hysterial and told the neighbors that someone had tried to rape her.

The victim and Tony then went back to the victim's house but found no one there. Linda testified that she looked out the window and saw a man dressed in an Army field jacket and jeans standing outside the victim's home. Tony called the police from his residence. The victim told the police that she had been sexually assaulted and described the attacker as wearing jeans and a black western shirt with flowers on the shoulders. She told the police that her front door was closed but had been left unlocked the night before.

The victim was examined at the hospital emergency room. She had recent scratches and abra-

APPENDIX D

SUPREME COURT OF NEBRASKA
2413 State Capitol Building
Lincoln, Nebraska 68509
(402) 471-3731

JOHN D. CARIOTTO
Clerk
JAN CULVER
Deputy

November 7, 1983

Mr. Timothy K. Ford
600 Pioneer Building
Seattle, WA 98104

Re: State v. Harper, No. 82-725

Dear Mr. Ford:

In response to your letter of October 25, 1983, please note that on September 28, 1983, the motion of appellant for rehearing in the above captioned case was overruled.

If you need further information, please advise.

Sincerely,

Jan Culver
Deputy Clerk

APPENDIX E

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

THE STATE OF NEBRASKA, Plaintiff, vs. STEVEN ROY HARPER, Defendant.	DOC. 104	NO. 228
	MOTION TO VACATE AND SET ASIDE	

COMES NOW Steven Roy Harper, and pursuant to the provisions of the Nebraska Post Conviction Act, Section 29-3001, et. seq., R.R.S. 1943, says to the Court that he is presently a prisoner in custody of the Nebraska Penal and Correctional Complex serving consecutive sentences of ten years on three counts of poisoning with intent to kill, wound or maim. The Defendant is also under a sentence of death on two counts of first degree murder. The Defendant's constitutional rights were infringed upon and denied such as to make the sentence and judgment void or voidable under the Constitutions of both the United States and the State of Nebraska in the following particulars:

1. The Defendant was rendered prejudicially ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution. His trial counsel failed to render competent assistance to the Defendant in the following respects:

a. By failing to adequately impeach or attack the credibiliy of the State's witnesses;

b. By failing to adequately investigate the case;

c. By failing to take sufficient and proper depositions of State's witnesses;

d. To render other such effective assistance of counsel in the general preparation of the case and presentation of a defense.

FILED
IN DISTRICT COURT
DOUGLAS COUNTY, NEBRASKA
NOV 9 1981
CLERK

2. The Defendant was not accorded adequate notice of the aggravating circumstances charged by the prosecutor and relied on by the trial court as a basis for imposing the death penalty, in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

3. That petitioner's death sentence violates the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States for the reason that under the present Nebraska death penalty procedures, the death penalty is discriminatorily applied against defendants accused of killing Caucasians, against impoverished defendants and against male defendants; and the petitioner's death sentence was imposed pursuant to this discriminatory pattern and practice. The probability of execution is overwhelmingly greater in cases where the victim is Caucasian or where the defendant is poor or male than in cases where the victim is a member of an ethnic minority or where the defendant is affluent or female. Petitioner's death sentence was imposed pursuant to the pattern of economic and sexual discrimination set forth above, in violation of the Equal Protection Clause of the Fourteenth Amendment.

WHEREFORE, the Defendant prays that notice be served upon the Deputy County Attorney, that a hearing be held herein in these premises requiring the plaintiff to show cause why the judgment and sentence herein should not be vacated and set aside; that the Court vacate and set aside the judgment and sentence and that the Defendant be discharged and for such other and further relief as justice and equity require.

DATED this 8 day of November, 1981.

STEVEN ROY HARPER, Defendant,

By _____
STANLEY A. KRIEGER
Assistant Public Defender
Attorney for Defendant

STATE OF NEBRASKA)
) ss
COUNTY OF LANCASTER)

STEVEN ROY HARPER, being first duly sworn on oath, deposes and states that he is the Defendant herein and that he is fully

familiar with the facts and circumstances as set forth in the above Motion to Vacate and Set Aside and that he is presently incarcerated in Lincoln, Lancaster County, Nebraska, and states that the above allegations are true as he verily believes.

STEVEN ROY HARPER

SUBSCRIBED AND SWORN to before me this 8 day of November, 1981.

STANLEY A. KRUEGER
General Notary-State of Nebr.
My Commission Expires
July 6, 1983

Notary Public

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Motion to Vacate and Set Aside was delivered personally to the office of Douglas County Attorney Donald L. Knowles, Douglas County Attorney, 406 Hall of Justice, Omaha, Nebraska, on this 9 day of November, 1981.

83-5815

Supreme Court, U.S.
FILED
DEC 30 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1983

STEVEN ROY HARPER,

Petitioner,

v.

STATE OF NEBRASKA,

Respondent.

BRIEF OF RESPONDENT IN
OPPOSITION TO CERTIORARI

PAUL L. DOUGLAS
Attorney General

J. KIRK BROWN
Assistant Attorney General

2115 State Capitol
Lincoln, Nebraska 68509
Telephone (402) 471-2682

Attorneys for Respondent.

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STATEMENT OF THE CASE

Sometime between 8:00 p.m. September 9, 1978, and 1:00 p.m. September 10, 1978, the petitioner, Steven Roy Harper, broke into a home in Omaha, Nebraska, and placed a significant quantity of a known carcinogenic substance in containers of milk and lemonade located in the refrigerator of that residence (Petitioner's App. A, 208 Neb. 570-571). Various members of the family who resided in that home and their guests ingested the poisoned fluids on September 10, 1978. On September 12, 1978, eleven month old Chad Shelton died as a result of consuming poisoned milk (Petitioner's App. A, 208 Neb. 571). On September 15, 1978, Duane Johnson died as a result of consuming the poisoned lemonade (Petitioner's App. A, 208 Neb. 572). Harper was not arrested until October 13, 1978, and never provided any information to authorities which did or could have saved the lives of his two victims (Petitioner's App. A, 208 Neb. 573).

Subsequent to his arrest Harper voluntarily confirmed, when questioned by the police, the identity and quantity of the lethal substance he had placed in the Johnson residence. The trial court suppressed this testimony during the guilt phase of the trial (Petitioner's App. A). At the sentencing phase of the proceedings the trial court considered the information Harper had provided the authorities but declined to conclude that his actions, in view of the actual victims of these homicides, rose to the level of being deemed a mitigating circumstance or consideration in passing sentence (Petitioner's Brief, p. 11; Order of Sentence, p. 19-20).

> Therefore, the court finds that very little weight should be given to the defendant's subsequent admissions, since he failed to act at a time when such information was essential to the survival of Duane Johnson and Chad Shelton and to the complete recovery of Bruce and Sallie Shelton and Sherrie Johnson.

Id.

In Harper's state court challenge to the effectiveness of his trial counsel he did not assert the particular corruption of trial counsel's ineffectiveness urged for the first time in this proceeding (Brief of Appellant, Supreme Court of Nebraska, Case

No. 82-7241. Harper's contention at that juncture was that his counsel was ineffective by allowing certain disclosures in the presence of the trial court, not that his trial counsel had failed to bring these matters to the trial court's attention. Id. The language cited at page 18 of Harper's petition was made solely as an aside to buttress the argument actually raised, considered, and rejected by that court (Petitioner's App. A, 214 Neb. 915).

We strenuously disagree with Harper's characterization of the issues presented the court below for decision (Petitioner's Brief, p. 18-19). He attempts to place before this court, by a petition for certiorari, an issue never specifically placed before the court whose decision they now seek to have reviewed. In fact, that issue was never even before the trial court which performed the fact finding function in this instance (Petitioner's App. E, paragraph 1).

ARGUMENT

I.

THIS COURT SHOULD NOT FUNCTION AS THE ORIGINAL FACT FINDER ON THIS ISSUE.

A.

It is interesting to note that Harper now seeks, through yet another set of counsel, to have this court concern itself not with an appellate or constitutional question, but to function as the original fact finder on a previously unlitigated issue. The question of whether Harper received constitutionally adequate counsel during his penalty phase proceedings was not before the state trial court when his conviction was reviewed under Neb.Rev.Stat. §§29-3001 et seq. (Reissue 1979). See, Petitioner's App. E, paragraph 1. The subject was only broached in passing in Harper's brief on appeal. Yet he now requests this court to "determine whether petitioner was denied effective assistance of counsel at the penalty phase of his capital trial." Petitioner's Brief, p. 20. This type of question cannot and should not be raised or resolved for the first time before this court. Harper should not be afforded a broader scope of challenges here than he would arguably be able to present a federal district court under 28 U.S.C. §2254.

As Harper noted in his brief below:

> This argument is divided into two parts. The first will consider whether or not Mr. Corrigan acted as effective counsel in the investigation and preparation of a plea of insanity. The second part will consider whether or not Mr. Corrigan acted effectively in regards to the procedure we call the "disclosure hearing".

State v. Harper, 214 Neb. 911, 336 N.W.2d 597 (1983), Brief of Appellant, p. 15. The editing of Harper's present counsel (Brief of Petitioner, p. 18-19) cannot disguise the simple fact that an issue is being raised at this juncture for the first time.

B.

Second, Harper's entire factual premise is not only untimely raised here, but it is inaccurate. The trial court in this matter had available to it, at the time of the penalty phase

hearings, the testimony Harper here claims should have been presented. The trial judge had heard that testimony at suppression hearings prior to when the guilt phase began. Furthermore, the language of the sentencing order clearly demonstrates that Harper's cooperation following the deaths of Chad Shelton and Duane Johnson was before the court, was considered and weighed by the court, but found not to rise to the level of a mitigating circumstance (Petitioner's Brief, p. 11, Order of Sentence at 19-20).

II.

BURDEN OF PROOF ON QUESTION OF EFFECTIVE ASSISTANCE OF COUNSEL.

We will not argue here that there are not varying standards employed allocating the criminal's burden of proof on the issue of effective assistance of counsel. We do believe that this case, in its present context, presents a poor record upon which to address that question.

First, we believe, regardless of which standard is employed, this case does not support a finding of constitutionally inadequate assistance of counsel. Second, Harper's entire argument here is based upon questions of fact which have never been addressed or resolved by a state fact finder, a state appellate court, or a federal trial court. This is not, in our estimation, an appropriate forum to argue or resolve factual questions, yet on the present record that is exactly what must occur before the legal issue may be reached.

If a split of authority does exist, as alleged by Harper, this case would presently prove a poor vehicle by which to resolve that matter.

III.

REGARDLESS OF THE STANDARD EMPLOYED, PETITIONER'S TRIAL WAS CONSTITUTIONALLY ADEQUATE.

The standard for evaluation of the effectiveness of Harper's counsel which was employed by the Supreme Court of Nebraska is the same standard urged upon that court by Harper below. We believe, in view of the Supreme Court of Nebraska's comments upon the resolution of this matter (Petitioner's App. C, 214 Neb. 916-917), that regardless of the standard employed the result in this case will remain the same. There is no reason to believe that an application of the standard articulated in Hawkman v. Parratt, 661 F.2d 1161, 1167 (8th Cir. 1981) would in any respect alter the outcome in this matter.

For each and all of the foregoing reasons we urge this court to deny the writ prayed for here by the petitioner.

STATE OF NEBRASKA, Respondent.

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing brief for respondent in opposition to petitioners upon the petitioner herein by placing same copy in the United States Mail, first class postage prepaid, addressed to petitioner's attorneys of record, James E. Lobsenz, 812 Smith Tower, Seattle, Washington 98104; Timothy K. Ford, 600 Pioneer Building, Seattle, Washington 98104; and Vincent Powers, 134 South 13th Street, Suite 1214, Lincoln, Nebraska 68508. Dated this 29 day of December, 1983.

Patrick T. O'Brien
Deputy Attorney General